TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 251

JAMES STEWART & CO., INC., APPELLANT,

vs.

KATHERINE SADRAKULA, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF NICHOLAS SADRAKULA, DECEASED

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED AUGUST 1, 1939.

INDEX.

	PAGE
Statement Under Rule 234	1
Notice of Appeal to Appellate Division	2
Summons	4
Amended Complaint	5
Answer to Amended Complaint	8
Plaintiff's Bill of Particulars	10
Judgment Appealed From	15
Case and Exceptions	16
Motions to Dismiss	17, 98, 112
Concessions	17
Motions for Direction of Verdict	112
Certificate as to Evidence	122
Opinion of Lewis, J.	122
Stipulation Settling Case	123
Order Settling Case	123
Waiver of Certification	124
Order Filing Case	124
Notice of Appeal to Court of Appeals	125
Order of Affirmance	127
Judgment of Affirmance	128
Order on Motion for Leave to Appeal	130
Memorandum of Appellate Division	131
Waiver of Certification in Court of Appeals	132

PLAINTIFF'S CASE.

Katherine Sadrakula:	
Direct	19
Anthony F. Moran:	
Direct	24
Cross	35
Redirect	52
Recross	58

PAGE

Frank Arthur Benson:
Direct. 60
Cross. 72
Redirect. 80
Harold A Malkin:
Direct. 81
Cross. 81
James Murray:
Direct. 82
Cross. 88
Redirect. 92
Recross. 92
John Finnegan:
Examination before Trial. 93

DEFENDANT'S CASE.

Carl G. Edlund:
Direct. 102

PLAINTIFF'S EXHIBITS.

	Admitted Folio	Printed Page
1—Photograph.	96	116
2—Photograph.	100	117
3—Contract between James Stewart & Co., Inc., and United Hoisting Company.	101	118

DEFENDANT'S EXHIBITS.

A for Identification—Contract between James Stewart & Co., Inc., and United States Government.	333	121

	Original	Print
Remittitur of Court of Appeals	133	133
Order amending remittitur of Court of Appeals	135	134
Order of Supreme Court of New York on remittitur of Court of Appeals	136	135
Judgment of Supreme Court of New York on remittitur of Court of Appeals	139	137
Petition for appeal to the Supreme Court of the United States	141	138
Assignments of error	149	142
Order allowing appeal	152	143
Citation and service	(omitted in printing)	154
Supersedeas bond on appeal	(omitted in printing)	155
Stipulation as to transcript of record	156	144
Statement of points to be relied upon and designation as to printing record	157	145

Court of Appeals

OF THE STATE OF NEW YORK.

KATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Plaintiff-Respondent,

against

JAMES STEWART & CO., INC.,
Defendant-Appellant.

Statement Under Rule 234.

The summons and complaint herein were served on January 16, 1936. An amended complaint was served on February 10, 1936. Issue was joined by the service of defendant's answer to the amended complaint on February 20, 1936.

Plaintiff appeared by Jenkins, Stewart & Fixler, for whom McCarthy, Fixler & Stewart were later substituted. Defendant appeared by Frederick Mellor.

There has been no change of parties or of attorneys herein except as stated.

4 **Notice of Appeal to Appellate Division.**

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

KATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,

Plaintiff,

against

5

JAMES STEWART & CO., INC.,

Defendant.

Sirs:

PLEASE TAKE NOTICE that the defendant above named hereby appeals to the Supreme Court, Appellate Division, Second Department, from the judgment entered in the County Clerk's office of Kings County on the 24th day of November, 1937, for the sum of Twenty-six thousand one hundred ninety-seven and 08/100 ($26,197.08) Dollars in favor of the plaintiff and against the defendant,

6 and the said defendant hereby appeals from each

and every part of said judgment as well as the whole thereof.

Dated, New York, December 2nd, 1937.

Yours, &c.,

FREDERICK MELLOR,
Attorney for Defendant,
Office & P. O. Address,
60 John Street,
Borough of Manhattan,
City of New York.

8

To:

McCARTHY, FIXLER & STEWART, Esqs.,
Attorneys for Plaintiff,
165 Broadway,
Borough of Manhattan,
City of New York.

COUNTY CLERK OF KINGS COUNTY.

9

10 **Summons.**

SUPREME COURT,

COUNTY OF KINGS.

KATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Plaintiff,

against

JAMES STEWART & CO., INC., and
R. E. CARRICK & CO., INC.,
11 Defendants.

Plaintiff designates Kings County as the place of trial.

To the above named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorneys within 20 days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

12 Dated, January 13th, 1936.

JENKINS, STEWART & FIXLER,
Attorneys for Plaintiff.
Office and Post Office Address,
165 Broadway,
Borough of Manhattan,
City of New York.

Amended Complaint.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

[SAME TITLE:]

Plaintiff, for her amended complaint, respectfully alleges:

FIRST: Upon information and belief the defendants are domestic corporations duly organized and existing under and by virtue of the Laws of the State of New York, maintaining offices in the City of New York.

SECOND: That on or about the 24th day of October, 1935, Nicholas Sadrakula was employed by the United Hoisting Company, Inc., as a rigger in and about a building in the course of construction at Church and Vesey Streets, in the Borough of Manhattan, City and State of New York, which property was owned by the U. S. Government and upon which was being constructed a Federal building.

THIRD: Upon information and belief the defendant, James Stewart & Co., Inc., was the general contractor for the construction of the aforesaid building, and on or about August 15, 1935, it entered into an agreement with the United Hoisting Co., Inc., for the installation of a concrete mixing and hoisting plant in the western section of said building.

FOURTH: That upon information and belief defendant R. E. Carrick & Co., Inc., was employed by the defendant James Stewart & Co., Inc., to supervise the installation of said hoisting plant and to do the actual concrete work for the general contractor.

FIFTH: Upon information and belief upon the day in question guide rails of said building plant had been duly constructed up to the sixth floor of said western building and the motor to be used for hoisting purposes was being installed on the first floor, and it was on this floor that deceased was working at the time of this accident.

SIXTH: That on said date the deceased was working at, near or upon said guide rails on the first floor and was caused to fall from said place to the basement floor below, sustaining serious injuries thereby, as a result of which he died the same day.

SEVENTH: That the fall and resulting death was caused solely by the negligence of the defendants in failing to provide deceased with a safe place to work, in failing to properly plank over, cover, guard and protect the shaftways, wells or other openings on the floor in question, particularly where the deceased was working at the time; the defendants were otherwise negligent in failing to comply with the provisions of the Labor Law and such other provisions of law applicable in the premises.

EIGHTH: That on or about the 1st day of November, 1935, Limited Letters of Administration of the goods, chattels and credits which were of

icholas Sadrakula, deceased, were issued to the laintiff herein and plaintiff duly qualified and en- ered upon her duties as such administratrix of id estate and is now acting as such. That plain- ff's intestate left surviving him as next of kin, atherine Sadrakula, his wife, the administratrix erein, Edward Sadrakula, aged 18, a son and tanley Sadrakula, aged 16, a son.

NINTH: That the said next of kin have been amaged to the extent of One Hundred Thousand $100,000) Dollars.

WHEREFORE, plaintiff demands judgment in the im of One Hundred Thousand ($100,000) Dollars ogether with the costs and disbursements of this ction. 20

JENKINS, STEWART & FIXLER,
Attorneys for Plaintiff,
Office & P. O. Address,
165 Broadway,
Borough of Manhattan,
City of New York.

(Verified January 29th, 1936.)

21

22 **Answer to Amended Complaint.**

SUPREME COURT.

COUNTY OF KINGS.

[SAME TITLE.]

The defendant, James Stewart & Co., Inc., by its attorney, Frederick Mellor, answering the amended complaint of the plaintiff herein:

I. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "First" of said amended complaint, except admits that this defend-
23 ant is a domestic corporation.

II. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "Second" of the complaint, except admits that the Federal Office Building was being erected at Church and Vesey Streets, New York City.

III. Upon information and belief, denies each and every allegation contained in paragraph "Fourth" of the complaint, except admits that this defendant entered into a contract with R. E. Carrick & Co., Inc., whereby said R. E. Carrick & Co.,
24 Inc., was to supervise and direct the furnishing and providing of all labor, work and materials necessary or required to do the concrete and cement work required in the construction of the Federal Office Building.

IV. Upon information and belief, denies each and every allegation contained in paragraphs "Fifth," "Sixth" and "Ninth" of the complaint.

V. Upon information and belief, denies each and every allegation contained in paragraph "Seventh" of the complaint, insofar as said allegations relate to this defendant.

VI. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "Eighth" of the complaint herein.

FOR A SEPARATE AND DISTINCT DEFENSE, DEFENDANT, JAMES STEWART & CO., INC., ALLEGES:

VII. That the injury alleged to have resulted in the death of the plaintiff's intestate, was caused by the negligence of said plaintiff's intestate in failing to observe apparent dangers and to exercise reasonable care for his own safety and otherwise through his negligent conduct under the circumstances presented to him.

WHEREFORE defendant demands judgment dismissing the complaint of the plaintiff herein, together with the costs and disbursements of this action.

FREDERICK MELLOR,
Attorney for Defendant,
James Stewart & Co., Inc.,
60 John Street,
Borough of Manhattan,
City of New York.

(Verified February 18, 1936.)

28 **Plaintiff's Bill of Particulars.**

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

[SAME TITLE.]

Plaintiff, for her bill of particulars herein, alleges as follows:

1. The plaintiff's intestate was working on the first floor, close to the hod hoist rails which were near that portion of the building 29 which would be the corner of Vesey Street and West Broadway, N. Y. C.

2. Deceased was working lawfully on the first floor and he was engaged at the time of his accident in the installation of the apparatus of the hod hoist, including the bringing up of a concrete bucket. This work took him close to the hod hoist rails which had theretofore been partially installed and extended up to the fifth or sixth floors.

3. On information and belief, the first floor, particularly that portion thereof from which the deceased fell, was under the joint super- 30 vision of both of the above defendants.

4. The answer to demand "3" is also an answer to demand "1."

5. Guide rails are part of the construction of a hod hoist shaftway and it is by means of these rails that the hoist is guided in its ascent and descent.

6. The guide rails referred to were installed by the employees of the United Hoisting Company, whose principal place of business is located at 136th Street and Locust Avenue, in the Borough of Bronx, City of New York.

7. The deceased was within a few feet of the guide rails at the time he fell.

8. At the time of the accident, the guide rails were not upon the floor; they projected up through the first floor and continued upward for several floors above.

9. The distance that the deceased fell was 32
approximately 40 feet.

10. On information and belief, the deceased either fell through the hoist shaftway or through spaces in the floor that existed on every side of the shaftway; his body came against the concrete or hard materialed portion of the floor of the basement on the West Broadway side of the hod hoist and at a few feet from its base; located a few feet away was a sand pile.

11. The defendant, R. E. Carrick & Co., Inc., was negligent in the following respects:

(a) In failing to comply with the laws and 33
customs in building construction, which required that company, as supervisor over the installation of the apparatus and hoisting materials of the United Hoisting Company, to barricade, safeguard and otherwise protect employees of the latter company.

(b) In failing to supply the necessary material to safeguard the floor upon which the deceased was located at the time he fell.

(c) In failing to plank over the spaces of the floor in which the deceased fell.

(d) In failing to place barriers or barricades around the hod hoisting shaftway.

(e) In failing to take proper supervision over the progress of the work for the protection of the deceased and other persons necessarily engaged in the installation of the hod hoisting apparatus.

(f) In failing to remove from dangerous places at or near the place where the deceased was required to be, all sorts of loose planks, old ladders, beams and other materials.

(g) In permitting employees of the R. E. Carrick & Co., Inc., to throw about and carelessly place all sorts of loose beams, ladders, planks and other material where they were calculated to cause obstruction to those working in that neighborhood of the shaftway and to present seemingly safe ways to move around, whereas in fact, they were inherently unsafe, untrustworthy and in the nature of traps.

(h) In failing to exercise any care whatsoever in R. E. Carrick & Co.'s supervision of the progress of the work on the first floor where deceased was necessarily working at the time of the accident; more particularly, in that Robert E. Carrick, President of the said defendant company and one Mathew Salterelli, Superin-

tendent of said defendant, failed completely to actively supervise the progress of the work and to provide safeguards for the benefit of deceased and other workers in his vicinity.

(i) The said defendant, R. E. Carrick & Co., Inc., and the two aforesaid employees of that company were further negligent, careless and reckless in that they ordered the employees of the United Hoisting Company to proceed with their work at a time when said defendant and its said employees knew that the conditions under which said work was to be performed were hazardous, dangerous and contrary to the 38
general provisions of law and customs of the building trade.

12. The specific laws to which the plaintiff refers, are Sections 200, 240, 241 and 241a, and also Section 196 of the Code of Ordinances of the City of New York, entitled "Protection of Floor Openings" and such other amendatory acts of said various laws and ordinances.

13. The deceased was a strong, healthy, able bodied man of excellent physical and mental condition. At the time of his death at the age of 40 years, he was earning an average of forty ($40.00) Dollars a week and frequently over-
time; his expectancy of life can be tabulated 39
from any of the mortality tables by the defendant as well as by the plaintiff. The plaintiff, however, will claim that his life promised to be a long one because of his physical condition and would estimate that he would have lived three score and ten years, which would mean that his salary for that period of time would

amount to Sixty Thousand ($60,000) Dollars without overtime. Furthermore, at the time of his accident, he had risen from the position of an ordinary workman and had become a "rigger" which is a highly specialized form of mechanical work.

With reasonable expectancy, a man of his age and ability would have risen to a higher position in the course of time with an increase in his income.

The deceased left a wife and two minor children, as more particularly appears on the face of the complaint. An additional item of expense was his funeral, which cost Six Hundred Twenty-five ($625.00) Dollars.

14. The answer to the 13th demand constitutes also an adequate answer for demand #14.

15. Limited Letters of Administration were issued by the Surrogate of Kings County on or about the 1st day of November, 1935; neither the plaintiff's attorneys nor the plaintiff have a copy of these letters, but defendant can easily procure a copy of them from the office of the Surrogate of Kings County.

Dated: New York, N. Y., May 7th, 1936.

JENKINS, STEWART & FIXLER,
Attorneys for Plaintiff,
165 Broadway,
Borough of Manhattan,
City of New York.

(Verified May 8th, 1936.)

Judgment Appealed From.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

[SAME TITLE.]

The issues in the above entitled action having duly come on for trial before Mr. Justice Harry E. Lewis and a jury at Trial Term, Part 8 of the Supreme Court of the State of New York, Kings County, on the 9th day of November, 1937, and the action having been discontinued without costs, upon consent, as against the defendant, R. E. Carrick & Co., Inc., and having been duly severed and continued as against defendant, James Stewart & Co., Inc., and at the end of the entire case both sides having waived the jury and submitted all issues of law and fact to the Trial Judge for determination, and findings of fact and conclusions of law having been duly waived, and the Court having rendered and filed a decision in favor of plaintiff,

NOW, on motion of Herman J. McCarthy, of counsel for the plaintiff, it is

ADJUDGED, that Katherine Sadrakula, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased, residing at 148 North 9th Street, Borough of Brooklyn, City and State of New York, recover of the defendant, James Stewart & Co., Inc., of 230 Park Avenue, Borough of Manhattan, City of New York, the sum of $23,125.00, together with interest of $2,890.63, together with costs and disbursements in the sum of $181.45, duly taxed, making a total of $26,197.08, and that plaintiff have execution therefor.

Dated: New York, November 24th, 1937.

JOHN N. HARMAN,
Clerk.

46 **Case and Exceptions.**

NEW YORK SUPREME COURT,

KINGS COUNTY.

TRIAL TERM—PART VIII.

KATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Plaintiff,
against
47 JAMES STEWART & CO., INC., and R. E. CARRICK & CO., INC.,
Defendants.

Before:
HON. HARRY E. LEWIS, *Justice*, and a Jury.

Brooklyn, N. Y., November 8, 1937.

APPEARANCES:

HERMAN J. MCCARTHY, Esq., for the plaintiff.

CLARENCE E. MELLEN, Esq., for the defendant James Stewart & Co., Inc.

48 WILLIAM GOLDMAN, Esq., for the defendant R. E. Carrick & Co., Inc.

(A jury was duly selected, impaneled and sworn.)

(Mr. McCarthy, for the plaintiff, made an opening statement to the jury.)

Mr. Goldman: If your Honor please, since the opening statement was taken down, on behalf of the defendant Carriek I now move to dismiss the complaint upon the ground that it appears by the opening statement itself that no cause of action was pled or stated as against the defendant Carrick, and I call your Honor's attention to the cases cited on pages 21 and 22.

The Court: What do you say, Mr. McCarthy?

Mr. McCarthy: As I explained to your Honor in chambers, I had nothing to do with the preparation of these pleadings. I concede that our case against Carrick is far-fetched but——

The Court: Even under the statute it said, "All contractors and owners."

Mr. McCarthy: That is right.

The Court: Do you want to discontinue as to him?

Mr. McCarthy: I am perfectly willing, if Mr. Goldman will be so gracious, and so that the jury understands that this is no fault or error on our part.

The Court: Oh, no. Discontinued without costs as to the defendant Carrick.

(Mr. Mellen, for the defendant Stewart, then made an opening statement to the jury.)

Mr. McCarthy: Your Honor, I wish to read a stipulation between the parties: "It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that upon the trial of this action it will be conceded that:

"(1) The United States Government by and with the consent of the legislature of the State of

New York, acquired title to the land or property referred to in paragraph two of the amended complaint herein, located in the Borough of Manhattan, City, County and State of New York, bounded on the north by Barclay Street, on the east by Church Street, on the south by Vesey Street, and on the west by West Broadway, by purchase at private sale in separate parcels during the months of September, October and November, 1931, for the purpose of using the same as the site for a post office and office building necessary for the use of the Government of the United States, and that
53 an agent, authorized under the hand and seal of the head of an executive department of the Government of the United States, caused to be filed and recorded in the office of the Secretary of the State of New York certified copies of the record or transfer to the United States of the property herein described, together with copies and descriptions of such lands by metes and bounds without a certificate of the Attorney-General of the United States that the United States was in possession of the land hereinbefore described on December 26, 1935.

"(2) The deceased, Nicholas Sadrakula, died on October 24, 1935, as a result of injuries received by him that day, when he fell to the lowest or sub-
54 basement floor from the floor immediately above it known and referred to as the basement floor.

"(3) The fair and reasonable value of the funeral expenses incurred by the estate was $625."

The Court: Is the date of the accident the date of death, October 24th?

Mr. McCarthy: Yes, the same day, sir.

KATHERINE SADRAKULA, 148 North 9th Street, Borough of Brooklyn, City of New York, the plaintiff, called as a witness in her own behalf, after being duly sworn, testified as follows:

Direct examination by Mr. McCarthy.

Q. Mrs. Sadrakula, compose yourself and speak loudly so that not only I, but all these jurors can hear you, please. Try to keep your voice up for me. You are the widow of Nicholas Sadrakula, is that right? A. Yes.

Q. And you are the plaintiff in this action, is that so? 56

The Court: We know that.

Mr. McCarthy: That is right. Now I offer in evidence, your Honor, copy of certificates, the letters of administration issued out of the Surrogate's Court, Kings County.

Mr. Mellen: I will concede them.

The Court: Conceded that they were issued.

Q. At the time of your husband's death, October 24, 1935, Mrs. Sadrakula, how old was he?

By the Court.

Q. How old was your husband when he died? A. Thirty-nine. 57

By Mr. McCarthy.

Q. At that time how old were you? A. Thirty-nine. My husband thirty-nine ten months. I am thirty-nine.

59 *Katherine Sadrakula—Plaintiff—Direct.*

By the Court.

Q. How old were you when he died? A. Thirty-nine.

By Mr. McCarthy.

Q. Both thirty-nine, is that right? A. Yes.

Q. Did you and your husband have any children? A. Two.

By the Court.

Q. Boys or girls? A. Boys.

58 Q. What is the name of the oldest? A. Edward.

Q. How old was he? A. Eighteen.

Q. And the next one? A. Sixteen.

Q. What is the other boy's name? A. Stanley.

Q. Eighteen and sixteen? A. Yes.

The Court: All right.

By Mr. McCarthy.

Q. Was Stanley going to school at that time? A. Yes.

Q. At the time of your husband's death? A. Yes.

Q. What school was he attending? A. Some——

Q. Central Needle Trades High School? A. Yes, trade school.

60 Q. Day school. The other boy Edward, he was not going to school at that time? A. No.

Q. He was not working either? A. No.

By the Court.

Q. Was he working? A. No, he was not working at the time my husband died.

By Mr. McCarthy.

Q. How long had you and your husband been married at the time in October, 1935? A. Nineteen years and four months.

Q. You were married here in Brooklyn, were you? A. Yes, this time.

Q. You had continued to reside with your husband during those nineteen years and four months? A. What?

Q. Lived together, did you? A. Yes.

The Court: Use the monosyllabic words if you can. 62

Q. He had supported you during this time, had he? A. Yes.

Q. Maintained the house for the boys and yourself? A. Yes.

Q. And describe your husband's person to us—

By the Court.

Q. Was he a healthy man? A. Yes, he was healthy man.

Q. Was he sick at all? A. Never sick, he was never sick for nineteen years and four months for one day.

The Court: He was not sick during the time they were married. 63

By Mr. McCarthy.

Q. Describe his attitude or his temperament, his disposition, was he easy to get along with or was he quarrelsome?

The Court: That wouldn't make any difference.

64 *Katherine Sadrakula—Plaintiff—Direct.*

Mr. McCarthy: I think it might. It is one of the inferences.

The Court: No, that does not go to the question of compensatory damages.

Mr. McCarthy: No, no. Just one of the inferences.

The Court: I think not.

Mr. McCarthy: May I respectfully except?

The Court: Surely.

Q. During this time that you were married and living with your husband, say the year before his
65 death, how much money did he give you and bring home to you? A. Thirty-five, forty dollars.

Q. Thirty-five or forty dollars a week? A. A week, yes.

Q. Was that every week or was it sometimes more, sometimes less? A. Before.

Q. That was some time before? A. Yes.

Q. About two years before his death that is, in 1933, what was his weekly delivery of money to you? How much money did he give you every week two years before his death? A. Thirty-four, forty, sometimes more, fifty, before, before.

Q. I know, but just a question of how long be-
fore; do you remember what year that was? A.
66 Yes, in other years he make fifty, sixty dollars.

Q. Now, out of that money that he brought home, what did you do? Did you run the house with it? A. Yes.

Q. Did he take any money for himself?

The Court: Did she say how much he brought home?

Mr. McCarthy: Thirty-five to forty.

By the Court.

Q. Thirty-five to forty dollars a week? A. Yes.

By Mr. McCarthy.

Q. Did he take some of that money that he brought home? A. Yes, he take dollar a day.

Q. Dollar a day? A. Yes.

Q. Describe, if you will, the habits of your husband, was he a man who stayed home at night? A. Yes.

Q. Or was he a man who went out? A. He stayed home in the night, yes, never go no place, go with me. 68

The Court: We will assume he didn't belong to clubs.

Mr. McCarthy: That is what she told me.

Q. Did Stanley go to school during day or evening? A. My son?

Q. Yes. A. Yes, daytime.

Q. Not an evening school? A. No, daytime.

Mr. Mellen: No questions.

The Court: Have you got a stipulation here that Stewart was the general contractor on the job?

Mr. Mellen: It is admitted by the pleadings. There is no dispute about it. 69

70 *Anthony F. Moran—For Plaintiff—Direct.*

ANTHONY F. MORAN, 150 Kipp Avenue, Hasbrouck Heights, New Jersey, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. McCarthy.

Q. Mr. Moran, what is your business at the present time? A. Superintendent for the United Hoisting Company.

Q. United Hoisting? A. Yes, sir.

Q. What was your job during the year 1935? A. Same thing.

71 Q. And were you in charge of supervising the work of one Sadrakula, the man who died? A. Yes, sir.

By the Court.

Q. Did he work for your company? A. Yes, sir.

By Mr. McCarthy.

Q. How long had you known him? A. Thirteen years.

Q. How long had he worked for your company? A. Ten years.

Q. Describe the physical appearance of Nicholas Sadrakula, please. A. He was a man that weighed
72 about 190.

Q. How much at the time of his death? A. About 190 to 195.

Q. How tall was he? A. About five foot eight and a half.

Q. Was he an active man? A. Very active.

Q. Describe his capacity as a workman, if you will, please. A. He never lost a day while he was under me.

Q. What was his job with the company? A. Foreman and rigger.

Q. Particularly in reference to this job at the Vesey Street Federal Office Building, what was his capacity? A. Same thing.

Q. Was he in charge when you were away? A. Yes, sir.

Q. During the year preceding the day of his death, do you know what his average weekly earnings were? A. Thirty-five to forty on the average, that was single time.

Q. Excuse me. A. That was single time.

Q. Were there any compensations for overtime? 74
A. Double time for overtime.

Q. That was based upon what basic rate of pay? A. Seventy cents an hour at that time.

Q. That was in 1935? A. Yes, sir.

Q. Has there been any change in the basic rate of pay of a foreman and rigger from that time to this? A. $1.20 to-day.

Q. That is in the trade, is that right? A. Yes, sir.

Q. You have described the physical appearance of Sadrakula. Will you describe for us——

By the Court.

Q. Did you say $1.20 a day? A. $1.20, to-day. 75

By Mr. McCarthy.

Q. Will you describe his temperament, disposition if you will, spirits, as you last saw him? A. Very quiet, mild-mannered man. Devoted all his time to his work.

Q. Will you speak up loudly so that all the jurors can hear you? A. Very quiet, mild-mannered man, devoted entirely to his work.

76 *Anthony F. Moran—For Plaintiff—Direct.*

Q. Can you tell us exactly when was the last time that you had seen him before his death? A. I saw him that morning between eight and nine.

Q. Where did you see him? A. On the basement floor at the Federal Building.

Q. When you refer to the basement floor, do you mean the lowest floor or the floor above the lowest floor? A. No, the floor in line with the street level on West Broadway side.

By the Court.

Q. That is one floor above the basement? A. 77 Yes.

By Mr. McCarthy.

Q. In other words, the lowest floor of this building, we might stipulate, would be called the sub-basement floor.

Mr. Mellen: Yes.

Q. And the floor above where the bin was placed was the basement floor, is that right, sir? A. Yes.

Mr. Mellen: That is right, sir.

The Court: The basement is just the first story above?

Mr. McCarthy: The first story above. 78 Have you got the progress sheets?

Mr. Mellen: Here are some progress sheets that were kept by somebody on the job. There is no attempt made in these to say that the man who kept them actually knew of the condition.

The Court: They are not offered yet, so I don't know.

Mr. McCarthy: I have not offered them in evidence.

The Court: I said that.

By Mr. McCarthy,

Q. Mr. Moran, how long before the day of the accident to Sadrakula had you proceeded to install the equipment which had been ordered by Stewart? A. The day before.

Q. The day before? A. Yes.

Q. Did anyone point out to you the place where the guide rails were to go? A. Yes.

Q. Who did that? A. Matty Sartelli. 80

Q. Is he in court? A. Yes.

Mr. McCarthy: Matty Sartelli.

(A man arose.)

Q. Did you come in contact with a man by the name of Finnegan at that time? A. Yes.

Q. You knew Mr. Finnegan? A. Yes.

Q. Had known him a number of years? A. Yes.

Q. He is the general superintendent of the defendant James Stewart & Company? A. Yes.

Mr. Mellen: I object to that characterization as leading, if your Honor please. I don't know what "general" superintendent means. He was superintendent on that par- 81 ticular job.

Mr. McCarthy: That is all that I meant.

The Court: Well, strike out "general superintendent."

Q. The superintendent in charge of that particular job? A. Yes.

By the Court.

Q. Who was superintendent for Stewart? A. John Finnegan.

By Mr. McCarthy.

Q. You saw him around the building at the time that you were proceeding with the installation of your conveyor? A. Yes, sir.

Q. Were you familiar with the progress which had been made by your crew after you left on the day of October 24th? A. I left them at 9 o'clock. I didn't get back there again until the afternoon
83 around four.

Q. By that time the accident had happened? A. By that time the accident had happened.

By the Court.

Q. Tell me so the jury will understand: What were your men to do there on this building? A. Erect the concrete bucket for hoisting concrete.

Q. From the sub-cellar? A. Sub-cellar up to the height of the building.

Q. A concrete bucket? A. Bucket, yes.

By Mr. McCarthy.

84 Q. For raising that bucket, what did you use there? A. The power?

Q. Now, I mean how did you raise it—on what forms? A. On rails, guide rails.

Q. Those are guide rails? A. Yes.

Q. And how far are they spaced or were they spaced, Mr. Moran? A. Between rails?

Q. That is right, sir. A. 55 inches.

Q. That is a little over 4 feet, is that right, sir? A. Yes.

By the Court.

Q. What do you mean between rails? That is the width of the shaft through which this went was 55 inches? A. From this point to this point.

Q. The width between the two tracks was 55 inches? A. 55 inches, approximately.

By Mr. McCarthy.

Q. What was the other dimension of the shaftway to accommodate the bucket? A. The shaft is, as I remember, it was probably about 10 foot long in the span, what we call the bay. 86

By the Court.

Q. What do you mean by that? A. The width of the span.

Q. Then it would be 10 feet by 55 inches? A. Yes. Well, no——

Mr. McCarthy: Talk louder.

A. That bay was probably about 10 by 12 feet, as I remember it.

By Mr. McCarthy.

Q. The whole bay? A. Yes. 87

By the Court.

Q. What do you mean by a bay? A. Just the width of the beams where they are made fast on the panels.

Q. Put it this way, the space, the entire space was ten by what? A. Twelve about.

Q. Ten by twelve? A. Yes, sir.

88 *Anthony F. Moran—For Plaintiff—Direct.*

Q. How large was the bucket that was to— A. 55 inches, the bucket.

Q. Fifty-five by what? A. Fifty-five by fifty-five, square.

Q. So that went up into that larger space? A. Yes, sir.

By Mr. McCarthy.

Q. On the day in question, where was the bucket that you have been referring to? A. In the basement.

Q. Was it in position at that time? A. In posi-
89 tion.

The Court: What basement is he referring to, the lowest part?

Mr. McCarthy: That is the lowest part, the sub-basement.

The Court: You say——

Mr. McCarthy: We were all mixed up in this examination before trial.

The Court: We don't want to be mixed up here. That is the reason why I break in once in a while.

By Mr. McCarthy.

Q. That was in the sub-basement, Mr. Moran, is
90 that right? A. Yes, sir.

Q. Where was it, if you know, at the time that you left there on October 24th, in the sub-basement? A. It was in the sub-basement.

Q. In relation of the guide rails which were being erected, where was it? A. They were up about to the second, the third tier, second tier, one story above the basement floor.

By the Court.

Q. Who was there, what was there? A. The rails, the guide rails, the rails that was going to guide this bucket, Judge, your Honor.

Q. Those were the rails that you were installing? A. Yes, sir.

Q. They were up to the third floor? A. Up to the second floor.

Q. What does that mean, that is two stories above the sub-basement? A. One story above the sub-basement. We call the sub-basement the first floor as we would call it; then the second tier would be the second floor. The same as this would be 92
the basement floor here and that would be the second floor on our way of figuring.

Q. Let's see if we can't get it a little bit better. There was a street level, wasn't there? A. Yes, sir.

Q. Then there was one floor below that, is that right? A. That was the bottom.

Q. What do you call that? A. The basement.

Q. What do you call the floor level of the street? A. Sub-basement floor.

Q. As you go up it becomes "sub"?

Mr. Mellen: The difficulty, your Honor, is this, I don't think there is any question about it; photographs will show there was really no street level. There was the sub-basement, then the basement, and the street 93
level actually came about midway between the basement level and the first floor.

The Court: Your gentlemen work it out. You are very skilled.

Mr. McCarthy: We will have to wait until we get some pictures in here anyway.

The Court: All right.

94 *Anthony F. Moran—For Plaintiff—Direct.*

By Mr. McCarthy.

Q. Were you familiar with the condition of the first floor above the sub-basement on the day that the accident happened to Sadrakula? A. Yes.

Q. At the time that you left it? A. Yes.

Q. In the morning? A. Yes.

Q. Can you describe the condition of that area around the guide rail shaftway on the day in question that you left? A. It was practically an open area.

Q. Were there any planks there at all? A. Yes, a few.

95 Q. I show you a picture and I ask you if that picture, particularly referring to the areas surrounding the guide rails and on both sides, foreground and background, accurately and fairly reproduces the condition of the first floor on the Federal office building on the day that Sadrakula died, as you last saw it at 9 o'clock in the morning? A. Yes, sir.

Mr. McCarthy: I offer it in evidence.

Mr. Mellen: You said that this represents the condition.

By the Court.

96 Q. When he left on that day; that was about 9 o'clock on October 24th? A. Yes, sir.

The Court: Mark it.

(Received in evidence as Plaintiff's Exhibit 1.)

The Court: Hand it to the jury.

(Exhibit 1 was handed to the jury.)

By Mr. McCarthy.

Q. Does that position show in detail the exact position of the planks or does it show it generally? A. General.

Q. There might have been a change here and there? A. Yes.

Q. I show you a picture and I ask you if that is a fair and accurate representation of the sub-basement floor particularly referring to the position of the bucket and the open bays on the first floor above on the day in question when you left at 9 o'clock in the morning? A. Yes, sir.

98 Mr. McCarthy: I offer that in evidence.

(Handed to Mr. Mellen.)

The Court: This is one story above?

Mr. McCarthy: No, this is one story below.

The Court: You are using "sub" in a different way than he does. That is where the confusion arises. Have them put it basement and one story above. This is the basement, is it?

The Witness: Yes, the basement, your Honor.

The Court: Any objections, Mr. Mellen?

Mr. Mellen: No, as long as it is understood; of course the stipulation uses the term 99 sub-basement and I don't want any question that there is a change or departure from the stipulation.

The Court: Of course, but so that there will be no confusion, let's call what really is the cellar the basement and the floor above one floor above. Won't that be better?

Mr. Mellen: That is all right.

The Court: Because they use sub-basement when it isn't at all.

By the Court.

Q. This—? A. This is the bucket.

Q. This is the lowest part of the building? A. Yes.

The Court: Mark that.

(Received in evidence as Plaintiff's Exhibit 2.)

Mr. McCarthy: At this time, your Honor, I offer in evidence the original contract between James Stewart, called the contractor, and the United Hoisting Company, called the sub-contractor on August 15, 1935, executed by what appears to be the proper parties.

Mr. Mellen: There is no dispute about that.

(Received in evidence as Plaintiff's Exhibit 3.)

Mr. McCarthy: Shall I read this contract?

The Court: What is the good of it?

Mr. McCarthy: This is between the United and Stewart.

The Court: Whereby the United is to erect this bucket?

Mr. McCarthy: That is right and make certain installation charges. There is a large hopper or bin as they call it.

Mr. Mellen: And other equipment.

The Court: You don't need that. If the jury want to see it later, they may.

Mr. McCarthy: All right, sir. That is all.

Cross-examination by Mr. Mellen.

Q. Referring to this photograph, Plaintiff's Exhibit 1, you said, I believe, that this shows the condition as you observed it on the morning of October 24th, 1935? A. Yes, sir.

Q. Everything in exactly the same position as it is here? A. There might have been a few planks moved from there or there might have been some 104
added.

Q. Well, don't you know as a matter of fact, Mr. Moran, that this photograph was not taken until about two months after this accident? A. No, I don't know that.

Q. Do you attempt to say that you can remember in detail the position of planks, ladders, ropes, things of that kind on the morning before this accident when you left the job? A. That was the condition when I was there.

Q. Well, let's call your attention to this first piece of wood that seems to be a spliced piece, in the foreground of the picture. A. This one here?

Q. Yes. You say that that piece of wood was 105
there in exactly that position when you left the job that morning? A. That was a rail.

Q. Do you say that that was there in that position when you left the job that morning? A. As I remember it.

Q. As you remember it? A. Yes, sir.

Q. Did conditions remain the same around that opening on that job for even thirty days after the accident? A. I wouldn't say that.

Q. They didn't, isn't that true? A. Thirty days? Impossible.

Q. A month, yes. Didn't conditions change on that job every day? A. Yes, sir.

Q. Work continued on after this accident, didn't it? Did it continue on after this accident? A. That is the condition it looked to me the morning I was there.

Q. Now, Mr. Moran, will you please answer my
107 question: The work continued after this accident, didn't it? A. Yes, sir.

Q. Your men went on and completed the installation of this various equipment? A. Yes, sir.

Q. And how long did you continue to work at the job? A. We were there every day for about a week during the installation.

Q. That is a week after this accident? A. A week after the accident, approximately.

Q. Did you see these pictures, either one of them, Plaintiff's Exhibits 1 or 2 taken? A. Only to-day.

Q. The first time you ever saw them? A. Yes, sir.

Q. So that since 1935 you haven't seen the photographs that you have seen this morning? A. No.

108 Q. And you say that you can recall that these photographs, that you never saw before, show the condition precisely as it was on the morning before this accident occurred? . . . .

The Court: On the morning of the accident.

Mr. Mellen: The morning of the accident, but prior to its occurrence.

A. That is the way it looked to me the morning of the accident.

Q. All right. You have spoken of a bay, Mr. Moran, isn't it in the building trade, by a bay they mean the steel enclosed within practically a square where there is a column at each corner? A. It shows right here, that is a bay.

Q. Would you please listen to me.

The Court: Just answer what you are asked.

Q. This photograph, Plaintiff's Exhibit 2, I call your attention here to an upright at the extreme 110
right of the photograph. A. Yes, sir.

Q. And another one in the middle of the photograph. A. Yes, sir.

Q. In back of it. Those are columns, are they not? A. Columns, yes.

Q. There would be another column which does not show, which would be approximately at the left-hand corner of the photograph here? A. Yes, sir.

Q. And another one here at the right? A. Yes.

Q. Isn't the space between those four columns a bay? A. That is what is a bay, yes.

Q. You had here in that bay it was subdivided at the floor above the bottom floor? A. Yes, sir. 111

Q. And so that you had two girders running through there that divided that bay into three panels? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. The bay itself was approximately 30 feet long by something like 20 feet wide, wasn't it? A. About that, yes.

Q. And each panel was also 30 feet long? A. Yes, sir.

112 *Anthony F. Moran—For Plaintiff—Cross.*

The Court: What is a panel?

Mr. Mellen: The subdivision of a bay.

Q. Is that correct? A. Yes, sir.

Mr. Mellen: In other words, you have three divisions of a bay and each is a panel.

Q. Is that correct? A. Yes.

Q. These in this building, the 30-foot dimension of the bay was east and west, wasn't it? A. Yes, I guess it was.

Q. One end toward West Broadway and the other end towards Church? A. Yes.

113

Q. And the divisions into panels was in the same way? A. Yes.

Q. So that each panel ran east and west? A. Yes.

Q. So that you then had a panel which was approximately 6 to 7 feet— A. Yes, sir.

Q. Wide and 30 feet long? A. Yes.

Q. Before you and your men came on the job, the location of this hoist and of the other equipment had been determined, hadn't it? A. Yes, sir.

Q. That is, your bosses go on the job first, don't they? A. Yes, sir.

Q. And in this particular case—do you know Mr. Edlund or Mr. Wisnar or Mr. White— A. Yes.

114

Q. They were all the executives of the Hoist Company, were they not? A. Yes, sir.

Q. In this case you followed the usual practice, they went on the job and the location in the job of the equipment was determined before you went there? A. Yes, sir.

Q. And you got your instructions when you went there as to the place that had been agreed upon? A. Yes, sir.

Q. In this case the place that had been agreed upon was in this particular bay? A. Yes, sir.

Q. And in the center panel, the middle panel? A. Yes, sir.

Q. To install this hoist and the rails on which the hoist would run, the opening had to be left for the steel, didn't it? A. Yes, sir.

Q. And if it were floored in or covered over, you couldn't install it? A. No, sir.

Q. And you said, I believe, that your men had worked there just a day before the accident? A. Yes, sir.

Q. Well, the accident was on the 24th of October, wasn't it? A. Yes, sir.

Q. Do you recall that you started putting in the guide rails on October 18th? A. That might be possible.

Q. Assuming that that was a Friday—and then you continued. Do you remember that Tuesday of the following week there was rain in the morning, does that refresh your memory as to the circumstance there? A. I don't remember that.

Q. Do you remember whether or not you worked in the afternoon of that day? A. I couldn't remember.

Q. You haven't any record that you have used to refresh your recollection as to just the dates of this work and so on, have you? A. No.

Q. So that when you said that you—I mean you and your men—worked just one day, you are relying on your recollection of three years ago? A. Yes, sir.

Mr. McCarthy: Two years ago.

Mr. Mellen: Two years ago, I should say.

118 *Anthony F. Moran—For Plaintiff—Cross.*

Q. Well, now, when you came to install this hoist; the panel in which it was to be installed was, of course, considerably longer— A. Yes, sir.

Q. Than the space that you needed for the hoist itself? A. Bucket, yes.

Q. And the first thing you had to do was locate exactly in what part of that panel you were going to put the hoist? A. Yes, sir.

Q. In other words, if we assume that the top of this table is the panel, the hoist was going to run up and down some place in this panel? A. Yes, sir.

119 Q. But, of course, you couldn't put the guide rails at the ends, fasten them on that steel? A. No, sir.

Q. Because that would be too far apart, isn't that right? A. Yes, sir.

Q. So that the way you do or the men under your supervision is you put some pieces of wood across the panel at spaces that will hold the rails just the right distance apart for the bucket, isn't that correct?

Mr. McCarthy: I object to this, if your Honor please, on the ground that it is not definite or binding and hasn't any reference to this particular job and does not show any duty.

120 The Court: I will allow it.

Mr. McCarthy: Exception.

Q. Isn't that true?

The Court: Read that, Mr. Reporter.

(The question was read by the reporter.)

The Court: I don't understand that.

Mr. Mellen: I will withdraw the question and try to frame it a little more intelligently.

The Court: I don't say it is unintelligent but you are so surfeited with it that you think we are.

Q. I call your attention to Plaintiff's Exhibit 2 and resting on the steel of the floor above the bottom floor to which the rail, guide rail, is attached is a piece of wood or more than one? A. Yes, sir.

Q. And that is what they call the bucking piece, isn't it? A. Yes, sir. 122

Q. And then there is another one to which the other rail is attached? A. Yes, sir.

Q. And those bucking pieces, as you call them—

By the Court.

Q. Where are they? A. Right here (indicating on Exhibit 2).

The Court: After we get through, we will know how to build a post office.

Mr. Mellen: That is one bucking piece and this is the other. No. 22. Wood. Did you all see where I pointed to?

(The jurors nodded assent.)

123

By Mr. Mellen.

Q. In other words, again taking the top of the table as the panel, one of those bucking pieces would be put about at any distance that you happened to choose from one end of the panel? A. Yes, sir.

Q. And then the distance that the other bucking piece would be from that would depend on the width of the bucket? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

By the Court.

Q. In this case it was 55 inches? A. About 55 inches.

By Mr. Mellon.

Q. Part of the erection job done by your men is the placing of those bucking pieces in the panel at
125 each floor level, isn't it? A. Yes, sir.

Q. And those bucking pieces are—what size are they, what kind of planks are they? A. Two by nine, about two by nine or nine by twelve.

Q. Of course these girders or beams are big I-beams, are they not? A. Yes, sir.

Q. In other words, in the shape of a capital I? A. Yes, sir.

Q. And there is a bottom flange, a projection? A. Yes, sir.

Q. And the bucking piece rests on the bottom flange? A. Yes, sir.

Q. Now, then, above that bucking piece you have what is shown here like a little piece of wood ex-
126 tending down from the top flange to the bucking piece inside that I-beam, a wedge, looks like a wedge? A. That is a rail.

Q. This right here, a little piece— A. That is a brace.

Q. That is to hold that bucking piece rigid on that bottom flange, isn't it? A. Yes, sir.

Q. And that also is a part of the installation of the equipment by the hoist men? A. Yes, sir.

Q. All of this work of installation of these guide rails, not only on this job, but all jobs when you start installing it, you have to have the open steel—A. Yes.

Q. There to put it in? A. Yes, sir.

Q. And your men usually go in on a job either before or at about the same time that the carpenters start the centering? A. Yes.

Q. And the floor slabs are not poured until after you get your equipment installed, are they? A. Not at all times. They had poured floor slabs on that building before we got installed.

128

Q. What is I mean is this: The purpose of this bucket hoist is to carry the concrete from the ground or from wherever the mixer is up to the various floors where it is to be used for pouring into the centers? A. Yes, sir.

Q. In this building on the basement floor on this floor above the bottom floor, on the morning of the accident, while you were there, the centers were over a considerable part of that building, were they not? A. Yes, sir.

Q. That is the forms. And there was some concrete poured in some parts? A. Yes, sir.

Q. That was what they call "ready mixed," wasn't it? A. Ready mixed, right.

Q. In other words— A. Brought in by a truck.

129

Q. It is a special kind of concrete that they can get that is already mixed and use it prior to the installation of the regular concrete equipment? A. Yes, sir.

Q. The guide rails by the morning of the accident had been put in for several floors? A. Up to the second.

Q. Well, that would be, if we call it the basement— A. Two floors.

Q. The floor above the bottom and one floor above that and another floor above that, so that it was up for three floors above the bottom? A. Yes.

Q. That means, of course, that the bucking pieces were in. A. Yes, sir.

Q. And had that work been done by Sadrakula and the men working under him? A. Yes, sir.

Q. And above the floor next—on the floors above the one that shows in the photograph, Plaintiff's Exhibit 1, the floors above that— A. Yes.

Q. The panel and bay were open, were they not? A. Yes, but the guides weren't fast.

Q. Were they open? A. Yes, the bay was open.

131

Q. On those floors at least two floors above this floor shown on Plaintiff's Exhibit 1, there were bucking pieces in place? A. I don't believe they had been placed up to that time on that floor.

Q. You told us that the guide rails were up. A. Yes, but they could be stuck up there without being bucked in.

Q. Please listen. Were they up? A. They were up.

Q. Were they fastened to anything? A. That I don't know up to that height. They weren't when I left.

Q. When you left that morning? A. They weren't bucked up to the second floor. They were on the

132 first.

Q. Just a minute. On the floor, on the second floor above the bottom, when you were there that morning, were the guide rails fastened to anything at that level, the second floor above the bottom? A. They were up to that floor. Whether they were fastened or not, I don't know.

Q. These guide rails are wood, are they not? A. Yes, bolted together.

Q. And they are bolted together, they are in rather long lengths, aren't they? A. 12 or 13 foot long.

Q. When you bolt them together you have about how many sections bolted in one? A. Two sections.

Q. So that you will have a piece about 26 feet long? A. Yes.

Q. There is no question that from the bottom floor to the floor above it, the guide rails on both sides were in position? A. Yes, sir.

Q. And at that level they were fastened to the bucking pieces? A. Yes, sir.

Q. Now, above that you saw that the guide rails 134
extended on up through the opening above that? A. Yes, sir.

Q. Were they just hanging swaying up there? A. The both rails were stuck up there, but to my mind when I left there that morning they hadn't been bucked in.

By the Court.

Q. You mean fastened? A. Fastened? They might have been, but I didn't see them fastened.

Q. They were fastened up to the first floor above the basement, but not above that? A. Not as I remember it.

By Mr. Mellen. 135

Q. When you looked up there, were there bucking pieces in place on that floor next above this one shown in Plaintiff's Exhibit 1? A. I don't remember that.

Q. What was the first thing that your riggers did when they came on that job? A. The first

thing they done was to measure up the well hole where the bucket was to go. Then plaged their rails.

Q. Would they put the bucking pieces in position before they put up the rail? A. Temporary, yes, the first rail.

Q. Isn't it a fact that the way that would be done would be to put up the rail on one side first? A. Yes, sir.

Q. They put the bucket in position down on the ground? A. On one side.

Q. So that the bucket would engage in the rail on that side? A. Right.

137

Q. Then take the rail on the other side and measure it in and fit it in position in contact with the attachment on the bucket? A. Right.

Q. So that you get the exact distance instead of measuring it with a ruler? A. Right.

Q. Then as you go up with your work you keep it in line with the plumb? A. Yes.

Q. And the location of these rails was a very important part of the job, wasn't it? A. Yes, sir.

Q. They had to be absolutely straight? A. Yes, sir.

Q. Or the bucket wouldn't ride up and down on it? A. Yes, sir.

Q. This bucket was to be electrically operated, wasn't it? A. Yes, sir.

138

Q. And it would travel at a very high rate of speed up and down there? A. Yes, sir.

Q. When in operation? A. Yes.

Q. So that the position of those guide rails was very important, wasn't it? A. Yes.

Q. And Sadrakula himself had the job of seeing to it that they were in accurate position, and accurate alignment? A. Yes.

Q. And he had to keep plumbing as the job went on, getting that plumb line along the rail to see that it was absolutely straight? A. Yes, sir.

Q. And in absolutely correct position with relation to the bucket, isn't that true? A. Yes.

Q. That meant careful measuring of the position of the bucking piece in the panel so that it would hold that rail in the proper position? A. Yes, sir.

Q. And wedging it in properly, isn't that true? A. Right.

Q. So that in doing that, Sadrakula, you saw him time after time, didn't you, working around this opening; as he is putting in the guide rails, he would lean over the edge, hold his plumb line down, measure the distances along the rail and its position in the opening, isn't that true? A. They measure the distance with a distance rod between the rail. 140

Q. He would have to drop a plumb line at times down in the opening? A. No, they measure them this way, rail here, rail there, in between.

Q. Please listen to me. Didn't he have to at times drop a plumb line right alongside of the rail? A. No, they never used the plumb line. They used their eye.

Q. What? A. They plumbed with their eye.

Q. What? 141

The Court: With their eye.

Q. They used something to see that those rails were absolutely straight up and down? A. Yes.

Q. That was Sadrakula's job, wasn't it? A. Yes.

By the Court.

Q. How long before the day of the accident had the guide rails been fastened up to the first floor, that is one floor above the lowest floor, if you know? A. I think, Judge, your Honor, there was one or two rails put in the day before.

Q. And fastened? A. No, they weren't fastened. They were only temporary.

Q. We are talking about the rails from the basement—the lowest part to the floor above. A. They were laid down from the floor above to the basement.

143 Q. But not fastened? A. Not fastened as I remember it.

By Mr. Mellen.

Q. In the work of installing the rails and the bucking pieces and so on in the panel, your men used planks, didn't they? A. Sometimes they did, sometimes timbers.

Q. Well, at any rate, they would take something and put them across the steel beams, isn't that true? A. Sometimes.

Q. Well, here that is what they did, didn't they? A. That I don't remember what they done there. There was some plank on that floor.

141 Q. You saw them taking planks, didn't you, and putting them there in position so that they could stand on them to do their work on the bucking pieces and the rails, didn't you see them doing that? A. That particular morning there was no plank around.

Q. Please, will you answer my question, Mr. Moran

(The question was read by the reporter.)

A. Yes, if you figure it that way.

Q. You returned about 4 o'clock that afternoon, did you? A. 4 o'clock.

Q. And you learned that an accident had happened? A. Yes, sir.

Q. And I suppose you went to where it occurred and looked around? A. Yes. I went right to the hospital from there.

Q. You questioned your men, didn't you? A. No, I went right to the hospital when I got to the job.

Q. Tell me: I call your attention again to Plaintiff's Exhibit 1. I notice a large contrivance of some sort with a couple of men standing in the shadows of it to the left of the photograph, what 146
is that? A. That is a bin, concrete bin.

Q. Material bin? A. Yes, that is for gravel and sand and cement.

Q. Was that in the position that it appears on the photograph at the morning of the accident? A. Yes, I believe it was.

Q. Was that something that your company also installed? A. Yes, sir.

Q. That was equipment that came under the contract of the United Hoist that you were furnishing for Stewart? A. Yes, sir.

Q. Was that part of the job of Sadrakula and the other riggers in installing that? A. Yes.

Q. That big bin there rested on the steel work, didn't it? A. Yes. 147

Q. And it took up all of the bay alongside of it, the bay adjoining the one where the hoist was? A. Yes.

Q. In the equipment that you were putting in—withdrawn for the moment. This building as it shows here in Plaintiff's Exhibit 2, only a section of the building went up at that particular time? A. Yes, that is right.

Q. In other words, excavation was going forward and then they started with the superstructure or the steel work at the westerly end? A. Yes, sir.

Q. In just one section, and this particular bay where the hoist was installed was in the extreme easterly bay? A. Yes, sir.

Q. So that you had no building beyond that particular bay? A. That is right.

Q. This photograph, Plaintiff's Exhibit 2, is taken looking east, isn't it? A. Yes, sir.

Q. And the bay immediately at the left in this photograph, this bay right along here at the left in
149 Plaintiff's Exhibit 2, which is the bottom floor—that is a different floor— A. Yes.

Q. —that is the bay upon which this bin rested on the floor above? A. Yes.

Q. On the bays to the south of the one where the hoist was—do you know what I mean? A. Yes.

Q. That would be on the right of the photographs as you have them there. A. You mean this here (indicating)?

Q. Yes, the next bay to the right. There was no steel work at all, was there, on that level, the floor above the bottom? A. No, there was a girder there.

Q. Isn't it a girder that runs east and west? A. Yes.

Q. Weren't the north and south girders open en
150 tirely? A. Yes.

Q. In other words, that was a driveway, wasn't it? A. Beyond this girder here was a driveway.

Q. To the right of those photographs? A. That was a ramp.

Q. Immediately alongside of it was a driveway? A. Yes.

Q. And that was left open entirely so that there would be head room for trucks coming back and forth through that drive?. A. Yes.

Q. So that at the basement level in this Plaintiff's Exhibit 1, which shows the floor above the bottom, there is no steel at all to the right of the photograph? A. Right.

Q. Plaintiff's Exhibit 1 is entirely open, there was no floor at all, it was the edge of the building? A. Right, the edge of the ramp.

Q. Now, the equipment that you were installing withdrawn. Did you have anything to do with the bricklayer's hoist? A. Yes. 152

Q. That was under a different contract. A. Different contract.

Q. With somebody else. Originally, wasn't it intended to place the bricklayer's hoist in this same bay but back in the corner at the right foreground of this picture, Plaintiff's Exhibit 1, wasn't that your original plan?

Mr. McCarthy: I object to this since it does not place the time, it does not have any relevancy to the issue involved here.

Mr. Mellen: At the time he first started to work here around October 18, 1935.

Q. When you first started the installation work— 153

Mr. McCarthy: I still say that has nothing to do with the condition that existed on the day of the accident.

The Court: The intention wouldn't control, would it, Mr. Mellen? It is what actually——

Mr. Mellen: What I want to show is this: That it was at about the time of this accident that the location of that bricklayer's hoist, the decision was made to change the location of that bricklayer's hoist, that at about this time it was still intended to put it at that position.

Mr. McCarthy: I object to that. That certainly is no excuse under the law for any failure to plank over in that particular place.

The Court: I will allow it.

155 Mr. McCarthy: Exception.

Q. The United Hoist had a contract with some other contractor on the job for the installation of a bricklayer's hoist, didn't it? A. Yes.

Q. And it was originally intended, planned and agreed to put that hoist in this same bay that the concrete hoist was placed, was it not?

Mr. McCarthy: I object to that.

The Court: I will allow it.

Mr. McCarthy: Exception.

By the Court.

Q. Was that the original intention? A. Not that
156 I know of. I don't think so.

The Court: He doesn't think so.

Mr. Mellen: That is all.

Redirect examination by Mr. McCarthy.

Q. Referring to that panel that is demonstrated in Plaintiff's Exhibit 1, here to the south of the panel where the guide rails were erected, you see that one there? A. Yes.

Q. Between this beam here and the farthest beam? A. Yes.

Q. Was it necessary to leave that open in order to erect the guide rails? A. No.

Mr Mellen: I object to that as calling for a conclusion.

Mr. McCarthy: Your Honor, I think Mr. Mellen opened the door by asking this question that it was necessary to leave it open, and the question now becomes how much was necessary to be left open in order to protect these workmen.

Mr. Mellen: Oh, no. 158

The Court: Don't you see, that he is deciding what the jury will have to decide.

Mr. McCarthy: No, but your Honor please, this question was presented to the witness——

The Court: I will exclude it.

Mr. McCarthy: I take an exception.

Q. Was it necessary to leave the entire panel surrounding the guide rails open? A. No.

Q. In order to erect these two guide rails? A. No.

Mr. Mellen: That is objected to.

The Court: Sustained. 159

Mr. McCarthy: Exception.

Q. Was it necessary to leave the panel to the north— A. No.

Q. Just a moment, please—to the north of the panel in which the guide rails were erected in order to install any of your equipment?

Mr. Mellen: That is objected to.

The Court: The form of your question is wrong because isn't that going to be the ultimate question for decision?

Mr. McCarthy: In a way it probably will reflect on it.

The Court: Don't you see, you are not asking opinion. You are having him state as a fact. Now he can give his opinion.

Mr. McCarthy: I will reframe the question, Judge. I can reframe it.

The Court: Yes, it is bad in form. I don't
61 suppose there is any question about his expert opinion?

Mr. Mellen: I think there may be a very serious question as to expert opinion.

The Court: Ask how many of these he has built and so on.

Mr. Mellen: We are dealing with placing centering. I don't think that this man knows anything at all about the centering or concreting——

Mr. McCarthy: I object to what Mr. Mellen thinks. He can't attack the testimony of this gentleman here.

The Court: I am going to allow Mr. McCarthy to try to qualify him.

62 Mr. Mellen: I thought your Honor was assuming qualifications?

The Court: No. I said he hadn't been qualified.

Q. How long have you been employed in this capacity as superintendent? A. Thirty-five years.

Q. During the course of your thirty-five years, have you been engaged in the erection of guide rails in different buildings? A. Yes, sir.

Q. What buildings have you erected guide rails on? A. All the big things in New York.

Q. Well, give us an example.

By the Court.

Q. How many? A. Radio City, Knickerbocker Village, Empire State.

By Mr. McCarthy.

Q. During that period of time of thirty-five years 164
you have had occasion to observe the custom and the operation and the installation of guide rails by your men? A. Yes, sir.

By the Court.

Q. And installation of planking? A. Yes, sir.

Q. Over the rails or beams? A. Over the beams.

Q. Over the steel beams? A. Yes, sir.

By Mr. McCarthy.

Q. Was it the usual custom to leave the entire bays open— A. No.

Q. At the time of the installation of the guide rails? 165

Mr. Mellen: That is objected to, if your Honor please. In the first place the question, qualification was his observation of the custom of his men.

The Court: Oh, no.

Mr. Mellen: That was the question asked.

The Court: Read the question.

166 *Anthony F. Moran—For Plaintiff—Redirect.*

(The question was read by the reporter as follows: "Question: During that period of time of thirty-five years you have had occasion to observe the custom and the operation and the installation of guide rails by your men?")

By the Court.

Q. Have you observed the custom throughout the Manhattan area or the area in the City of New York— A. Yes, sir.

Q. As to how these planks were placed? A. Yes.

167 Mr. Mellen: That is objected to.

The Court: I will allow it. Just yes or no, whether he has observed it.

By Mr. McCarthy.

Q. How many other companies are there that erect these guide rails in the City of New York? A. Three.

Q. Three others or three including your own? A. Two others including our own.

Q. Two including our own? A. Three including our own.

Q. Can you tell us from watching——

168 *By the Court.*

Q. Have you observed the way that the other companies have done their work? A. No, I have not. I never bothered.

Q. Then you don't know what the custom is, do you? A. The custom is the same all around.

Q. If you have not observed it, you don't know what the custom is, do you? A. I wouldn't say that.

The Court: All right.

By Mr. McCarthy.

Q. In the installation of the guide rails, did you use this panel in any way for any installation, that is to the south, the one on the, as you look at it, would be the right of the ~~panel in~~ which the guide rails were erected? A. You mean the panel behind the guide rail?

Q. To the right. A. No. 170

Q. Didn't use that for the installation of any guide rail, did you? A. No.

Q. Or for the installation of the bucket? A. No.

Q. Did you use the part of the area in the panel to the west or to the east of the particular panel where the guide rails were erected for the installation of the guide rail or any other part of your equipment? A. Not east of that.

Q. Did you use any part of the panel to the west of where the bucking piece and guide rail was for the installation of your equipment or your guide rail? A. Only to roll that bin over. That is all.

Q. You do that how? A. On three by nine timbers. 171

Q. Those you put down? A. Yes.

Mr. McCarthy: That is all.

Recross-examination by Mr. Mellen.

Q. Taking the panel, middle panel, where the guide rails were installed, until they were installed by your men, nobody could tell in just what part of that panel they were going to be——

Mr. McCarthy: I object to that, if your Honor please.

The Court: Sustained. Already asked and answered long ago, under your cross-examination.

173 Q. Your work during all of these thirty-five years has been entirely in the installation of equipment in buildings, hasn't it? A. Mostly, yes.

Q. Have you ever worked at the construction of reinforced concrete floor slabs? A. No, sir.

Q. Or of the construction of centers for reinforced concrete floor slabs? A. No, sir.

Q. Don't know anything about it, do you? A. Any more than the way they are laid.

Q. You have seen it, that is all? A. I have seen it, yes.

Q. But to know anything about it, you don't, do you? You have never worked at it? A. No.

By Mr. McCarthy.

174 Q. On the day in question you stated before that the steel work above this was all open? A. All open.

Q. And particularly the area above the guide rails there? A. Right.

Q. There was nobody working up there that you know of? A. No.

By Mr. Mellen.

Q. Do you know as a matter of fact that prior to this day both Sadrakula and his men had worked on the floors above this floor that is shown in Plaintiff's Exhibit 1? A. No, I wouldn't say I did.

Q. You know, don't you? Didn't you see them up there? A. The day before the accident?

Q. I didn't say the day before, but some time before the day of the accident. A. On that particular job?

Q. On that job. A. The only thing they had to do above that was to plumb down.

176

By the Court.

Q. Did you see them working above? A. No, I did not. I know they do it, though.

By Mr. Mellen.

Q. From the position of the rails and what had been done on the morning of the accident, the day of the accident, had there been in the routine of the work some plumbing down? A. Yes.

Q. And that would mean from floors above this floor? A. Floor above that, yes.

Q. And that would be Sadrakula's job? A. Yes.

Q. And he had been up there? A. Yes.

177

Mr. Mellen: That is all.

Mr. McCarthy: That is all.

178 *Frank A. Benson—For Plaintiff—Direct.*

FRANK ARTHUR BENSON, 2241 Creston Avenue, Borough of the Bronx, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. McCarthy.

Q. Mr. Benson, by whom are you employed? A. By United Hoisting.

Q. In what capacity were you employed? A. Rigger.

Q. Were you so employed on the 24th day of October, 1935? A. Yes, sir.

179 Q. And were you employed on what is known as the Federal Office Building job? A. Yes, sir.

Q. And were you one of the men that was working in the gang under Sadrakula? A. Yes, sir, I was.

Q. Do you remember the day of the accident to Sadrakula? A. Yes, I remember it well.

Q. How long before the day of the accident had you been working on that job? A. Well, I come there in the evening the day previous to the accident.

Q. Are you sure about that? A. Yes, about 4 o'clock, I think.

Q. Were you familiar with the condition of the bay in which the guide rails on the west side of 180 that building on the first floor had been erected? A. Yes, I was.

Q. Were you familiar with it at the time that you went there the day before the accident? A. Yes.

Q. Will you describe the condition of the bay and all the panels in there, particularly in refer-

ence to planking over the steel beams on the first floor above the basement floor on the day before the accident?

Mr. Mellen: I object to this, "the day before the accident."

The Court: I will allow it. Then they can show that the same—of course the issue will be what was the condition on the day of the accident, but they lead up, of course.

Mr. Mellen: All right.

The Court: Read the question.

(The last question was read by the reporter.) 182

Q. On the day before the accident, when you first went down there— A. The bucket was placed almost in the center of that bay.

Q. That is in the basement floor? A. Yes.

Q. Now I am speaking about the floor above that, Mr. Benson.

By the Court.

Q. What was the condition of the planking on the floor above where the bucket was the day before the accident? A. Next to one of the guides was a plank, an 8-inch plank. I remember that well. Then came——

Q. An 8-inch plank? A. Yes, an 8-inch plank. 183
Then there was a ladder and two rails, I believe. And there was a beam. I think there was a beam laying closer to the girder, next to the forms.

Q. Laying next to what? A. Next to the forms.

Q. What do you mean by "forms"? A. That is the forms where they pour the concrete on.

The Court: All right.

By Mr. McCarthy.

Q. Were you familiar with the condition of the first floor above the basement of the particular place referred to before just about the time the accident happened to Sadrakula? Were you familiar with the condition of the planking at this particular bay at the time the accident happened to Sadrakula? A. Yes.

Q. And was it different or was it the same as the condition which had existed the night before? A. Well, that was the same. It was not changed because I remember that well.

185 Mr. Mellen: I object to anything that is volunteered.

The Court: Well, that is not important.

By the Court.

Q. Where was that 8-inch plank? A. Laying next to the guide, facing west.

Q. One 8-inch plank? A. Yes.

Q. There were no other planks other than the 8-inch plank over that bay? A. No, not until—I think there was a 9-inch beam laying next to that girder but——

Q. What do you mean by a 9-inch beam? We don't know. A. Nine by three-inch beam.

186 Q. Is that a metal beam—steel beam? A. No, wooden beam.

Q. There was a 9-inch beam next to it. Where was the 9-inch beam? A. That was laying close to the girder that was north and south where the bucket was placed in that bay.

By Mr. McCarthy.

Q. Now I show you the picture which has been introduced in evidence as Plaintiff's Exhibit 1 and ask you if that is a fair and accurate reproduction of the condition that existed on that particular floor in the particular bay adjacent to the place where the guide rails were being erected, particularly with reference to the planking on the day of the accident to Sadrakula? A. That is a perfect picture.

Q. I call your attention to the beam or the plank which is shown there right adjacent to the guide rail. Is that the one that you are referring to? 188
A. That is the one (Plaintiff's Exhibit 1).

By the Court:

Q. Point that out. A. That is the one.

Q. Which, this here? A. Yes, sir.

The Court: Suppose I mark that "1."

Mr. McCarthy: If you please.

The Court: I just put a "1" alongside of the rail on the plank.

By Mr. McCarthy.

Q. Mr. Benson, you saw this picture before in my office, didn't you? A. Yes.

Q. You have seen that before? A. Yes. 189

Mr. McCarthy: For the purpose of keeping you familiar with the development here, it is this plank that runs north and south to what is the west. This would be the Hudson River side of this building. That would be the east. That is the Church Street side.

The witness has just referred to this plank that his Honor marked with a "1" as being the plank adjacent to the west side or the west of the guide rails.

By Mr. McCarthy.

Q. You worked there all day on the day of the accident to Sadrakula? A. Yes, sir.

Q. Did something happen some time in the day to Sadrakula—an accident happen to him? A. Yes, sir.

Q. About what time of the day, if you know?
191 A. Well, that is about—I cannot tell the exact time but I judge about 3.30 or something like that.

By the Court.

Q. In the afternoon? A. In the afternoon.

By Mr. McCarthy.

Q. Before this accident to Sadrakula, did you happen to have a conversation with or be in the company of Sadrakula, the dead man? A. Yes, sir.

Q. How long before the accident, if you remember, did that occur?

Mr. Mellen: I object to that. I don't know how he can know how long before the
192 accident it was unless he saw the accident.

Q. Before your attention was called to something happening to Sadrakula?

The Court: I will allow it.

A. About one minute.

Q. Where were you before this time expired with Sadrakula? A. Well, at the time Mr. Murray, Mike Secola and myself were standing in a place near where we was going to place the motor, and he had told me previously that the——

Mr. Mellen: I object to this conversation.

Q. Keep your voice up.

The Court: Make believe you are on the building.

A. O.K. At that time he told me to pull two guides together, those two guides was supposed to 194
be for backing up the other two guides that was usesl for bucket. We were going to bolt them together and cut them to exact measurement.

Q. Did you then leave Sadrakula? A. Well, Mike Secola and Mr. Murray and I, we was standing there talking and he said, "Well, all right. Now, go ahead and bolt them guides together."

By the Court.

Q. Who said that? A. Mike Secola: he was my foreman.

Mr. Mellen: They referred to him as Nick Secola, meaning the same person as the deceased. 195

A. (Continuing) Then he said, "All right now. Go ahead, bolt the guides together," and with that he picked up a stick, a long stick that he had prepared previously to use as a measurement.

Mr. Mellen: I object to this, if your Honor please.

196 *Frank A. Benson—For Plaintiff—Direct.*

The Court: "He picked up a stick." I will allow that.

Mr. McCarthy: These gentlemen over here say they can't hear because of the noise.

The Court: I will have it read if necessary.

By the Court.

Q. He picked up a stick and what else? A. He picked up a long stick that he was going to use for that purpose——

The Court: Strike that out.

197

Q. Then what happened? A. With that, I stooped down. I had the guide all ready and I bolted them two guides together and he walked away and I never saw him since.

By Mr. McCarthy.

Q. At the time that you turned around, did you leave him with anyone? A. With Mr. Murray.

Q. Then you turned around and went about your work, is that right? A. Yes, sir.

Q. Then some time after was your attention called to the absence of Secola? A. Yes, sir.

Q. How long after the time that you turned away was your attention called to the absence of Secola?

198 A. About one minute.

Q. Tell us how your attention was called to his absence. A. Well, he gave me instructions to bolt them two guides together and the two bolts that we was using was protruding through the guides so far, so in using it, for that purpose that he was going to do, it left a space in between the guides about that much. I figured on taking and remov-

ing the bolts and use spikes which will leave a flusher face like this. So I jumped up quick and I rushed over and I was going to tell him about it, and I says to Mr. Murray, "Where is Mike?" That is using my own words.

Q. Then what happened? A. Then I walked over to the ends of the forms and thought—I thought at the time that he walked around in my absence.

Mr. Mellen: I object to that.

Mr. McCarthy: I will consent that that be stricken out.

The Court: Let him finish. And what?

The Witness: I thought he walked around 200
the ramp and down——

Mr. McCarthy: Don't——

The Court: That does not hurt you any. Go ahead.

Q. So what? A. So I thought he walked around, going down to the sub-basement and I looked over and I saw him laying there.

Q. Now, I show you this picture, Plaintiff's Exhibit 2, and I ask you if that is a fair and accurate reproduction of the guide-rails and the position of the bucket as it existed on the day of the accident? A. Yes, sir.

Q. Where was Secola?

201

The Court: Where was his body?

Mr. McCarthy: He was still alive for the time being.

The Court: It is still his body.

Q. Where was his body at the time that you saw him downstairs? A. Well, he was laying on his back face up, facing southwest, more west close to the bucket.

Q. Where was his head, over toward the river? A. Yes, towards the river.

Q. He wasn't in the bucket? A. No, sir.

By the Court.

Q. Feet towards the bucket, you say? A. His feet towards the bucket, close to the bucket as I remember.

Q. Let's see here. Can you take this pencil and put the pencil about in the position which you saw his body? (Plaintiff's Exhibit 2.) Let the rubber end be the head. Which way is the body now? A. Just like this.

203

Q. Like that? A. Yes.

The Court: Do you get it?

Mr. McCarthy: Yes.

Mr. Mellen: Does the rubber represent the head?

The Witness: That is his feet.

The Court: Then we will put the point up there.

A. That is exactly how he was laying.

Q. Just like that? A. Yes, sir.

The Court: Should I draw a diagram there?

204

Mr. Mellen: I would be glad to have it, your Honor.

Q. His feet there and his body running like that? A. Very close, in that position.

The Court: I have drawn an arrow and the arrow part is the feet part and the body extending towards the bottom of the picture.

Q. Will you tell us this: Was it underneath the place where the bucket was or within that panel—I will withdraw it.

The Court: Show that to the jury. The arrow points to the feet. He said approximately that position (Exhibit 2 was then handed to the jury).

By Mr. McCarthy.

Q. Did you do anything after you looked down and saw Secola? A. We run down, Mr. Murray and myself, and saw him laying there.

Q. Did you go downstairs? A. No, we ran 206
around the ramp.

Q. You went around the ramp? A. Yes, that is right.

Q. Was anybody else there with Secola at that time? A. Well, there maybe had been somebody else, but I can't remember.

Q. When? A. At the time we come down there. Somebody come over after, but I went away.

Q. I mean at the time that you and Murray went downstairs, were you the first to be there? A. Yes, sir, we were the first.

Q. Did you see anybody else there at the time? A. No, sir.

Q. What did you do? A. Well, I was going to 207
call up an ambulance——

Q. All right. You did something. Did you go some place? A. Yes, I was going over to the office for—Mr. Carrick's office.

Q. Going to make a telephone call? A. Make a telephone call.

Q. Did you see someone there at the time that you went in? A. Yes, there was a timekeeper.

208 *Frank A. Benson—For Plaintiff—Direct.*

Q. Is he in court? A. Yes, I saw him pick up the receiver and call.

Q. No, is he in court, the timekeeper?

(A man arose.)

Q. Is that the man you saw? A. Yes, that is right.

Mr. Mellen: Allen.

Q. Where was he when you saw him for the first time and told him about this accident? A. He was just a little ahead of me going to the office.

209 Q. In reference to the office, was he near the office or near the scene of the accident? A. No, near the office.

Q. Which way was he facing at the time that you saw him?

Mr. Mellen: I don't see what materiality this has.

Mr. McCarthy: All right. We will get to that later.

Q. At the time that you were working there on the first floor were you working alone or was someone working with you? A. Well, there was another man there, too.

Q. What is his name? A. Hemsoth.

210 Q. Is he in court?

(A man arose.)

Q. Is that the man back there on the second row? A. Yes, that is right.

Q. He was working under you, is that right? A. Yes.

Q. He is not working for the United Hoisting Company now? A. No, not now.

Mr. Mellen: That is objected to.

The Court: I will allow it.

Q. Did you know before to-day or yesterday where he was working, did you know yesterday before you come to court where Hemsoth was working? A. Well, I know——

Mr. Mellen: I object to it as immaterial.

The Court: Sustained.

Mr. McCarthy: That is all.

212

By the Court.

Q. Was the body, the position of the body—do you know what a panel is in a bay, don't you? A. Yes, sir.

Q. The bay is the larger place, isn't it? A. Yes, sir.

Q. And the panel is a portion of a bay? A. Yes, sir.

Q. Was the body in part of the bay in which the hoist was, that is, under the bay where the hoist was?

Mr. Mellen: Under the panel I think you mean.

The Court: Under the panel. 213

Mr. Mellen: The panel is a part of the bay.

The Court: I understand that.

Q. The feet were toward the bucket? A. Yes, sir.

Q. And extending back away from the bucket, right? A. Yes, your Honor.

The Court: All right.

Cross-examination by Mr. Mellen.

Q. Mr. Benson, this hoist was just at about the middle of the bay, wasn't it? A. Just about the middle.

Q. And the bay was roughly 30 feet east and west and 20 feet north and south, isn't that about right? A. Well, I think there was one bay 30 feet.

Q. We are talking about this particular bay. A.
215 Yes, I think it was.

The Court: About what?

Q. About 30 feet east and west and about 20 feet north and south? A. That is right.

Q. And the bucket itself was only about 55 inches square, isn't that right? A. Yes.

Q. And the rails east and west were just 55 inches apart? A. Yes.

Q. They were about in the middle of that bay, is that right? A. About in the middle of that bay. Well——.

Q. Just a second. There was a middle panel in that bay, is that right? A. Yes.

216 Q. And the hoist was in the middle of that middle panel? A. No, it was not in the middle of that panel.

Q. Well, approximately that— A. It looks that way but it is 22 inches from the flange of the beam on one side, because——

Q. Look at Plaintiff's Exhibit 1. Isn't that hoist about in the middle of that middle panel? A. I will explain that if it is necessary.

Q. Well, all right. It was in some part of that middle panel, we will put it that way. A. Yes.

Q. The plank that you have marked here with a "1" was across that particular panel? A. Yes.

Q. Across that panel? A. Across the panel.

Q. And it was right back of the rail, that is, the westerly rail? A. That is right.

Q. And the plank was right back of it, is that right? A. Yes.

Q. Down on the ground, the sub-basement level, the bucket took up all of the space, filled all of the space down there between the two rails, didn't it? 218
A. Yes.

Q. And that particular plank was just about above where you saw—this plank that you marked "1" was just about above where you found his feet? A. That is right. The bucking piece was directly above there.

Q. The bucking piece was directly above where his feet were, is that right? A. That is right.

Q. The bucking piece on which that particular rail was attached, is that right? A. That is right.

Q. You and Hemsoth were the two riggers on that job that worked under Sadrakula? A. Yes.

Q. Isn't that right? A. Yes, sir. 219

Q. And when you came on the job, the first thing that you three men started to do was put in the guide rails for this particular hoist? A. Yes, sir.

Q. And where did you start putting, from the ground up or did you start at the top and drop them down? A. We started about 6 feet below the bucking piece.

Q. Below which bucking piece? A. On the ground floor level.

Q. Well, then, the very first thing that you did when you came on that job was to put in one of the bucking pieces on this level here shown in Plaintiff's Exhibit 1, is that right? A. What was the question?

Q. (The question was read by the reporter.) A. Yes, sir, we set the first bucking piece exactly and we worked from that on.

Q. That is the very first thing when you first came on that job, whatever day it was? A. Yes.

Q. You went in there and put in one of the bucking pieces on that floor above the bottom? A. The first thing we do, we get the location and then we put in the bucking piece accordingly.

Q. On this particular job which bucking piece did you put in first, the easterly or the westerly bucking piece? A. That was put in the day before.

Q. Whether it was the day before or a week before, which one did you put in first, the east or the west? A. That don't make no difference.

Q. Which did you? I don't care whether it makes any difference or not. A. Sometimes we put on the east and sometimes on the west.

Q. Do you remember which one you did on this job? A. No, sir, because I didn't put them in.

Q. Well, who did put them in? A. There was another man who put the first two floors——

Q. Hemsoth? A. No, I don't think he was there. Yes, that is right.

Q. Weren't you there the first day that the hoist company started to work on putting in these rails? A. I don't know who was there at first. Mike Secola put that in himself.

Q. You think he put the first one in himself? A. Yes.

Q. When you first came on the job, had this hopper or bin, rather, that shows on Plaintiff's Exhibit 1—was that there when you first came on the job? A. No, sir.

Q. When you first arrived on the job and before these bucking pieces were put in, were there any of these planks or boards that you have talked about that show in the picture in that bay? A. That is the way it was all the time then.

Q. When you first came on the job? A. Yes.

Q. Before there was any bucking pieces put in? 224
A. Mike Secola put the bucking pieces in so I can't answer that question.

Q. You don't know? A. I don't know.

Q. Then after the bucking piece was put in on that floor, did you put some in on the floors above? A. The floors above, yes.

Q. How many floors above? A. Only one floor.

Q. Well, then, the other bucking piece was not placed until after the rail was up on one side, part way up? A. That is right.

Q. Is that true? A. That is right.

Q. And then afterwards you put in the other bucking piece after the rail and the bucket were in place? A. Yes.

Q. Who put this other bucking piece in place on 225
this floor shown in Plaintiff's Exhibit 1? A. We put that in.

Q. What? A. I put that in.

Q. At that time when you put that bucking piece in, were the planks here as they are shown in this picture? A. Yes.

Q. Sadrakula was with you at that time, was he? A. Yes.

Q. When was that, the day before the accident or the same day as the accident? A. That was the same day I think.

Q. That you put that bucking piece in, is that right? A. In the morning.

Q. So this bin that shows in Plaintiff's Exhibit 1, was that put in the same day as the accident? A. Before 9 o'clock in the morning.

Q. Of the same day as the accident? A. Yes.

Q. That is correct, is it? A. Yes, sir.

Q. And was that put in by you and your men? A. Mike Secola and myself and I don't remember
227 who the other one was.

Q. There was nobody working on that floor on the day of the accident right around the bay where the hoist was and the bay where the bin was except the hoist company men, isn't that right? A. No, there was nobody else there. There was other people there but——

Q. Around those bays?

The Court: At those bays there was nobody else working?

The Witness: No, I don't think so.

Q. There is a ladder in this Plaintiff's Exhibit 1. Do you say that that was there at the time of the accident, just before the accident? A. It was
228 there, yes, sir.

Q. When did you first see that ladder there? A. I saw that the first thing I came there.

Q. That morning? A. That morning.

Q. On the day before, did you see that ladder there? A. Yes, sir.

Q. I thought you told us a minute ago that you didn't remember what, if anything, was around

that bay before you men started to work when you first went in there? A. I misunderstood the question then.

Q. Well, now, go back to that. This floor level, this bay, when you first came on the job before you and the other hoist men had done any work at all, was there anything across the steel in that bay? A. Nothing except that.

Q. Except what? A. Except what shows on the picture.

Q. What shows on the picture? A. Yes.

Q. So that from the time you first came there the morning, as you say, the morning of the day before the accident until the time of the accident, 230
none of this stuff that shows in the picture had been moved at all? A. No, sir.

Q. Not moved a sixteenth of an inch? A. Oh, well, maybe a sixteenth of an inch.

Q. Who moved it? A. We maybe walked across it and may have moved it that way, but it was not moved by hands.

Q. As far as you know? A. As far as I know, right.

Q. This plank, did you see anybody put this plank that you have marked with a "1" on here? A. No, sir.

Q. That was right alongside of the bucking piece, wasn't it? A. Right alongside or the guide, 231
above the bucking piece.

Q. Above the bucking piece? A. Yes.

Q. When that bucking piece was put there—withdrawn. You say that that plank was directly above the bucking piece? A. Not quite directly above the bucking piece.

Q. Was some part of it above the bucking piece? A. Yes.

232 *Frank A. Benson—For Plaintiff—Cross.*

Q. Well, then, that plank wasn't in that position when the bucking piece was put in, was it? A. Well, I don't know nothing about that.

Q. The bucking piece is put down from that floor down and rests in the flange? A. Yes, that particular bucking piece I did not put in so I don't know. There must have been there.

Q. I thought you told us a minute ago that you put in one of the bucking pieces but you didn't remember which one? A. I understood the question was for the floor above.

Q. No, on this floor which bucking piece did you put in? A. I didn't put in any of them on that
233 particular floor.

Q. Didn't you tell me just a minute ago that Sadrakula put in one of them on that floor? A. Yes.

Q. Now, listen to me.

The Court: Don't get angry. You don't usually do that.

Mr. Mellen: I am sorry.

The Court: I know you get tired toward noontime and we will have a recess in a little while.

Q. Didn't you tell me just a minute ago that Sadrakula put in one of the bucking pieces, the
234 first one that was put in on that job? A. The first one west on the ground floor.

Q. All right then. It was west, is that right? A. Yes.

Q. You know the method of putting in those bucking pieces, don't you? A. Yes.

Q. You know how it is done? A. Yes, sir.

Q. You know that it couldn't be put in if there was a plank resting on top of those beams partially above where the bucking piece was? A. Yes, can be put in.

Q. Could be done? A. Yes.

Q. Wouldn't it be much more convenient to move the plank?

Mr. McCarthy: I object to that, if your Honor please.

The Court: Sustained.

Mr. Mellen: I respectfully except.

Q. Well, did you fasten the rails to that westerly 236
bucking piece on that floor? A. Mike Secola himself.

Q. He himself did that? A. Yes.

Q. Did you see him do it? A. No.

Q. When was that done? A. The day previous to that day some time; I don't know when.

Q. Did he stand on that plank when he was doing that? A. Well, I couldn't tell you because I was not there.

Q. How do you know he did it then? A. He said he did it.

Q. What part of the building—withdrawn. You and Murray were a distance away from the hoist the last time that you saw Sadrakula, were you? A. Yes. 237

Q. And Hemsoth was with you at that time, was he? A. Yes, he was with us all the time.

Q. That is, there was Hemsoth and you were working on splicing these rails? A. Yes, sir.

Q. And Murray was an electrician, wasn't he? A. He is chief electrician, yes, sir.

Q. He had nothing to do with putting these rails together? A. No.

Q. He just happened to be there? A. Yes.

Q. After Mike, as you call him, left and you went to look for him? A. Yes, sir.

Q. And you saw Murray? A. What?

Q. You saw Murray, did you? A. Yes, sir.

Q. And you asked—I believe, you said you asked Murray where Mike was? A. Yes.

Q. Did Murray tell you? A. We looked up and I didn't pay much attention to it.

Q. Did you and Murray together look around and finally find him, is that it? A. Yes, sir.

239

Mr. Mellen: That is all.

Redirect examination by Mr. McCarthy.

Q. When you say you looked around, where do you mean that you looked; when you said that you looked around for Mike, where did you say you looked? A. Well, I walked over to Murray first and he was a little back of me, and then I hurried on and looked towards the bucket and I saw him laying down in the basement.

Q. You went right over, you mean to the girder; did you come to this part? A. Yes, almost to that part, that is the big girder.

240 Q. Then you saw his body down below, is that right? A. Yes, sir.

Q. Where was Murray standing in relation to where Mike was and where you were? A. Well, approximately 20 feet from the guide rail there west, that would be where we would place the motor.

Q. Who was there? A. Mr. Murray.

Q. Where were you in relation to where Murray was? A. About 10 feet farther west than that at the time.

Mr. McCarthy: All right.

HAROLD A. MALKIN, 105 Arden Street, Borough of Manhattan, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

242

Direct examination by Mr. McCarthy.

Q. Mr. Malkin, what is your business? A. I am a licensed engineer and land surveyor.

Q. Are you a photographer as well? A. Yes, sir.

Q. And are you in the business of taking pictures and making surveys? A. I am.

Q. And were you in that business during the month of October, 1935? A. I was.

Q. And did you at the request of someone, don't tell us who, take these two pictures which have been introduced in evidence and made part of the record in this case and identified as Plaintiff's Exhibits 1 and 2? A. I did.

Q. Will you tell us on what date you took them? 243
A. On October 26th, 1935.

Mr. McCarthy: That is all.

Cross-examination by Mr. Mellen.

Q. What was that you referred to, to get the date? A. The order and time I took it.

244 *Harold A. Malkin—For Plaintiff—Cross.*
James Murray—For Plaintiff—Direct.

Q. Is that a record you made? A. Yes.

Q. What time of the day did you take it? A. Before noon, about 11 o'clock.

Q. About 11 o'clock? A. On October 26th, 1935.

The Court: That is two days after the accident.

Mr. Mellen: That is all.

The Court: We will now recess until 2 o'clock.

(The Court then recessed until 2 o'clock.)

245

AFTERNOON SESSION.

(The trial was continued.)

JAMES MURRAY, 2821 LaSalle Avenue, Borough of the Bronx, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. McCarthy.

Q. Mr. Murray, will you keep your voice up, please, so that these people here can all hear you? What is your business? A. I am an electrician.

246 Q. By whom are you employed? A. The United Hoisting Company.

Q. Were you so employed in October, 1935? A. Yes, sir.

Q. Were you working on this job of the Federal Office Building with Mike Secola on the day that he was killed? A. Yes, sir.

Q. How long before that day had you been working on that job? A. About two days.

Q. What was your particular duty down there on that job, will you tell us? A. Well, we run the electric cable from the Edison box over to the electric machine that hoists up the bucket.

Q. You had occasion during the course of that time to be on the lowest basement floor, didn't you? A. Oh, yes, sir.

Q. And had you occasion during that time to be on the floor immediately above that, didn't you? A. Yes, sir.

Q. On the day before the accident to Secola, do you remember the condition of the bay in the area 248
of which the guide rails were being constructed? A. Yes, sir.

Q. You know by the bay I mean all the area within the four erect columns, is that right? A. Yes, sir.

Q. Do you remember the condition there on the day before or the two days before when you first went there in relation to planks over the beams in the vicinity or in the bay in the vicinity of the guide rails? A. Yes, sir.

Q. Well, will you describe the condition to us generally as you remember it two days before the accident when you first went there? A. Well, up where the electric motor was going it was on that 249
bay and we had to bring our wires around and there was a ladder and a plank and there may have been another beam or so there.

Q. I show you a picture which has been introduced in evidence and is part of the record in this trial, Plaintiff's Exhibit 1, and I ask you if that

250 *James Murray—For Plaintiff—Direct.*

picture fairly and accurately represents the condition on the first floor above the basement floor at the time you first saw it? A. Yes, sir.

Q. Now, Mr. Murray, you have seen that picture before, haven't you? A. Yes, sir.

Q. I show it to you the other day. A. Yes, sir.

Q. And did the condition that is represented in this picture continue up to and including the time that Secola had his accident from which he died? A. Yes, sir.

Q. Was it substantially that way, might have been a few changes do you mean or always that way? A. It was there while I was working there.

251 Q. Now I show you this picture of the basement floor, that is the floor where the bucket was, and ask you if that is a fair and accurate representation of the position of the bucket in reference to the guide rails on the day of the accident? A. Yes, sir.

Q. That is what it looked like? A. Yes, sir.

Q. Did you happen to be in the company of Secola at the time or just before something happened to him? A. Yes, sir, I was talking to him.

Q. You remember that something did happen to him, do you? A. Oh, yes.

Q. When and where and under what circumstance do you tell us that you were talking to Secola just before something happened to him? A.

252 We were standing on the floor above the basement.

Q. When you say "we" who do you mean? A. Mike Secola and Mr. Benson.

Q. And who else? A. That was all I recollect.

Q. Were you there? A. I was.

Q. All right. What happened? A. So I called him Secola because that was his name.

Q. That is what you nicknamed him you mean? A. Yes. He said to Mr. Benson, "All right, go ahead and cut the guide rails." So Mr. Benson turned to do his work.

Q. Which direction did he turn to or go into; referring to Benson? A. Well, Benson turned north and Mike and I stood there and he told me he was going to take a measurement of a guide.

Q. Did he have anything with him? A. He had a stick, so he walked, turned right about face and walked toward the guide rails.

By the Court.

254

Q. Who did? A. Mike Secola.

Q. Walked toward the guide rails? A. Yes.

By Mr. McCarthy.

Q. That is, the guide rails that are shown in this picture here? A. Yes, sir.

Q. He walked from the foreground of this picture then toward the back? A. Yes, sir.

Q. Did you watch him? A. Yes, sir.

Q. How long did you watch him? A. He walked out over the ladder and there was a plank there and he stood on the plank.

Q. Now, I show you this picture, Plaintiff's Exhibit 1, and I ask you if you can identify the plank that you say he walked onto, see if it is there? A. 255
There.

The Court: We will put a mark on it. Let's see it. We will put an "M" on it for Murray.

By the Court.

Q. Which one is it here? A. This one.

Q. This big one or the short one? A. This one that extends out here.

Q. Where did he stand, do you know? A. Right there (indicating).

The Court: All right. We will put an "M" at the place where he said the deceased was standing. Show that to the lawyers and show it to the jury.

By Mr. McCarthy.

257 Q. How long had you known Secola? A. Ten years.

Q. You both had been working for the same company during that time? A. Yes, sir.

Q. How did he appear to you physically?

The Court: There is no dispute about that.

Mr. McCarthy: I mean particularly on the day of the death. What were his spirits or his frame of mind?

The Court: Do you think there is a claim that he committed suicide?

Mr. McCarthy: Oh, Lord, no.

Mr. Mellen: I should say not.

258 Mr. McCarthy: All right.

By the Court.

Q. Did you see him fall? A. No, sir.

Q. You didn't. How long after you saw him on that plank at the place where we marked the "M" was it that you looked and didn't see him again?

Mr. McCarthy: Just a minute, please. I would like to lead up to that, if your Honor please. I think that something happened before he did turn around to look.

The Court: All right, but I thought you were through.

Mr. McCarthy: No, I hadn't——

The Court: Excuse me. Go right ahead.

By Mr. McCarthy.

Q. Tell us, how and when was your attention called to anything happening to Mike Secola? A. When I last seen him he was on the plank and then 260
I turned to pick up the electric wire, and I was on my knee when I heard a grunt.

Q. Did you hear anything else? A. No. So looking——

Mr. Mellen: The answer is no.

A. Looking backwards offhand I heard a cry from Mr. Benson. He said, "Where is Mike?"

Q. What did you do? A. I immediately got up and we went to the end to look over.

Q. What did you see? A. He was laying on his back down on the basement floor.

Q. Where was his head and where were his feet at that time? A. Where was what?

Q. Where was his head and where were his feet 261
at the time that you saw him? A. Well, his feet was towards the guide rails.

Q. Where was his head? A. Laying westward.

Q. That is over toward the river away from the bucket, is that right? A. Away from the guide rails.

Q. Where in relation to the guide rails were his feet? A. What is that?

Q. Where in relation to the guide rails of the bucket were the feet of Secola? A. About 3 feet.

Q. Away from it? A. West.

Q. The head was farther away than that? A. Farther away, yes.

Q. Then what did you and Benson do? A. When we seen him laying there, there was a ramp where the trucks went down, we ran down the ramp and on the way down I met the superintendent for Atwell Construction. I says, "Get an ambulance, the man fell down." Then I went down.

263 Q. Then you went down and you stayed there with him, did you? A. His legs were zigzagged and I tried to hold him down. He wanted to roll over.

Q. Was anybody else there at that time except you and Benson? A. Well, I seen Benson but in the excitement I was leaning over holding him there and I didn't take notice to who was around.

Q. At the time that he was out on the plank that you marked with the letter "M" did you see him do anything or did you just see him walk out on there? A. He had a stick, a measuring stick.

Q. Did you see him measuring anything? A. No, I didn't.

Mr. McCarthy. That is all.

264

Cross-examination by Mr. Mellen.

Q. When you got down to him after he had fallen, he was moving, was he? A. No, sir, he was laying still but he wanted to turn over.

Q. When you say he wanted to— A. He made an attempt.

Q. His body was moving? A. Yes, sir.

Q. And you were keeping him from doing it? A. Yes, sir, I tried to hold him down.

Q. You told us that you were an electrician? A. Yes, sir.

Q. This bucket hoist was to be operated by electricity, was it not? A. Yes, sir.

Q. And for that purpose there was to be an electric-powered motor with a drum on which there would be a cable? A. Yes, sir.

Q. And in this building that motor was going to be installed on this floor which appears here in Plaintiff's Exhibit 1 (handed to the witness)? The same floor from which Mike fell? A. Yes, sir. 266

Q. It was going to be installed in that part of the panel immediately west or back of the hoist rails? A. Yes, sir.

Q. In this section of the panel across which there are some planks and a ladder? A. Yes, sir.

Q. In that section? A. Yes, sir.

Q. The cable which would operate the bucket would run up, that was attached to the top of the bucket, was it not? That is, it would be when it was completed, attached to the top of the bucket in about the middle of the space between the two guide rails, do you understand what I mean? A. Well——

Q. We will get it this way: In this photograph, Plaintiff's Exhibit 2, there is a picture of the bucket? A. Yes. 267

Q. In the top of that bucket there is a section that runs across the tip and there is a hole in the middle of that top piece? A. Yes, sir.

Q. And that cable that would lift it up and down would be attached into that? A. Well, the riggers would do that.

Q. I don't care who did it, but that is the way it would be when it is finished, isn't that right? A. That wouldn't be my kind of work.

Q. You have seen it done lots of times, haven't you? A. Yes, sure.

Q. Now that is the way it would be done? A. Yes, sir.

Q. Your work had to do with the installation of the motor and of the machine that would operate the hoist, didn't it? A. Yes, sir.

Q. And would the placing of this motor be eventually a part of your job or just the electrical connections? A. Just the electrical connections.

269 Q. You were at that particular time running the cable over in the Edison Service to a point near this bay? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. That would be connected with this motor? A. Yes, sir.

Q. When it was eventually installed? A. Yes, sir.

Q. When you last saw Secola he was standing at the place that you have marked "M"—this plank that shows in the photograph— A. Yes, sir.

Q. Plaintiff's Exhibit 1. Do you remember the size of that plank? A. It was two by eight, I believe, an ordinary building plank.

Q. Regular building plank? A. Yes, sir.

270 Q. And how close was that plank to the guide rail? A. I didn't go out to see that. I knew he was standing on that plank. I don't know how close it was to the guide rail.

Q. It appeared to be right close to it, didn't it? A. Undoubtedly, because he was going to measure that guide rail.

Q. When you saw him he had this stick? A. Yes, sir.

Q. In his hand. About how long was that stick? A. Oh, maybe 15 feet, 10 feet, I didn't measure it.

Q. When you saw him standing there before you went on with your work, was he standing upright, was he stooped over or what position was he in? A. He went to take the first foot on the plank, he went to take his first foot on the plank.

Q. You have said that he was standing on the plank? A. One foot from the iron girder on the plank. In other words, he just got off the iron girder onto the wooden plank when he stood there.

Q. Did he have one foot on the plank? A. Two feet. 272

Q. Two feet on the plank? A. Yes.

Q. Both feet on the plank? A. Yes.

Q. Was he standing upright or was he leaning over? A. Upright.

Q. Did he have the stick in his hand at the time? A. Yes, sir.

Q. Was he holding the stick up in the air? A. No, I didn't see that.

Q. You noticed the stick in his hand? A. Yes, sir.

Q. Did you notice in what position it was held in his hand, whether it was upright or sideways? A. Straight. 273

Q. Straight up and down? A. Yes, sir, in the left hand.

Q. Vertical position? A. Yes, sir.

Q. Left hand? A. Yes, sir.

Q. Did you notice whether he was holding that against the guide rail or any part of the guide rail? A. Not up to that—I turned.

Q. You turned? A. I turned.

Q. When you saw him there you were back in the bay to the west of where he was? A. Yes, sir.

Q. And did you turn around and face to the west again and go on with your work? A. Yes, sir.

Q. And you had gotten down, kneeled and started to work? A. Yes, sir.

Q. And then you heard the grunt? A. I heard the grunt, yes, sir.

Q. You said that his feet were about 3 feet from the bucket when you got down there, when you saw him after he fell? A. Yes, sir.

275 Q. Did you notice that when you were still up on the first floor, on the first tier of steel or when you got down into where he was? A. When I looked over I seen him laying there with his head towards the west.

Mr. Mellen: That is all.

Redirect examination by Mr. McCarthy.

Q. Was he moving at the time you first looked down through the planks and saw him, was he moving at that time? A. No.

Q. When did he start to move? A. When I got to him he was still.

Mr. McCarthy: All right. Thank you.

276

Recross-examination by Mr. Mellen.

Q. You said that when you got to him you had to hold him still? A. No, when I was there; when I got there he was still but when I seen him move I held him there.

Q. After you got there you saw him? A. After I seen him try to turn over, because his feet was in a zigzag shape and I thought they were broken and I didn't want him to move until the doctor come.

Q. His feet were drawn up? A. Kind of zigzagged, you know.

Mr. Mellen: That is all.

Mr. McCarthy: At this time, your Honor, I wish to read from an examination before trial of JOHN FINNEGAN, taken in 165 Broadway, January 25th, 1937. Reading 278
from page 3:

"Question: On the 24th day of October, 1935, Mr. Finnegan, what was your employment? Answer: Superintendent of construction with the James Stewart & Company.

"Question: On that day, Mr. Finnegan, were you employed on that particular building?"

Mr. Mellen: On any particular building.

Mr. McCarthy: "On any particular building?

"Answer: Yes, the Federal Office Building, located at Vesey and Barclay Streets.

"Question: And did you have charge of the entire construction of that building? Answer: Yes, 279
as explained later at page 18."

Page 6:

"Question: The second photograph"—which I will connect up—"that I showed you, what floor does that show? Answer: The first floor.

"Question: And do both photographs show that side of the building nearest West Broadway? Answer: Yes.

"Question: The second photograph which I have not marked yet shows the first floor proper, does it not? Answer: Yes.

"Mr. Jenkins: I am going to mark this photograph Plaintiff's Exhibit 2 for Identification."

Mr. Mellen: For the purpose of this trial, your Honor, that has become Plaintiff's Exhibit 1 and we now call it the first floor.

281 "Question: At the time of the accident, which would be October 25th, 1935, was the flooring on the first floor, was that laid down? Answer: Do you mean the basement floor?

"Question: Any floor.

"The Witness: Not on the first floor.

"Question: In other words, aside from a number of planks, ladders or odds and ends, the floor was open steel work? Answer: Yes, that is the first floor."

Mr. Mellen: If your Honor please, I am going to object to that. That place counsel has said before, there was a lot of difficulty 282 about what was the first floor and what was the basement floor. At that particular point of the examination the witness asked if counsel was referring to the basement floor, and——

The Court: He has not read that to me

Mr. McCarthy: Yes, I said: "Do you mean the basement floor? Question: Any floor. The Witness: Not on the first floor."

The Court: Meaning?

Mr. Mellen: Meaning what? I don't know.

The Court: Well, the jury will have to take it for what it is worth. I can't tell. You have allowed this confusion. I don't say you. It may have been inadvertent. It started here until I tried to rectify it.

Mr. Mellen: The confusion, I think, came about in the first place—probably Mr. Jenkins, he had the formula of the questions here. 284

Mr. McCarthy: There is no confusion at all. Here are the questions that Mr. Jenkins asked. He asked him this question: "The second photograph which I show you which I have not marked yet shows the first floor proper, does it not?" He said, "Yes."

The Court: I think that is all right.

Mr. Mellen: I respectfully except.

The Court: Anything else?

Mr. McCarthy: Just one thing more. Page 14:

"Question: Was there anything for the workmen on the first floor to stand upon except the girders? Answer: I don't know. There may have been some planking there that workmen walked on." 285

The Court: Read that again.

Mr. McCarthy: "Question: Was there anything for the workmen on the first floor to stand upon except the girders? Answer:

I don't know. There may have been some planking there that workmen walked on."

Mr. Mellen: If your Honor please, the point is this: The fact that there is confusion is obvious from the fact that the testimony of the plaintiff's own witnesses is that there was flooring in over a large part of what has been referred to here as the floor from which the plaintiff fell.

The Court: The flooring to a large part?

Mr. Mellen: Yes, that is the testimony of Moran. It is the testimony of Benson.

Mr. McCarthy: No flooring at all.

287 Mr. Mellen: Not in that particular bay.

The Court: Well, I know, but it was the duty on the examination before trial of the counsel who represented the defendant to have clarified this examination. I must accept it unless there is objection to the question on legal grounds and I don't see any and it is not stated by you to be a legal basis for its exclusion.

Mr. Mellen: That is true.

Mr. McCarthy: One more question and then I will be through with this, your Honor. Same page, following question:

288 "Question: Did yourself as superintendent of construction order any planking to be made on the first floor? Answer: No."

Now, at this time, if your Honor please, I ask you to take judicial notice——

The Court: You don't have to call my attention to it.

Mr. McCarthy: Section 241, subdivisions 4 and 5.

The Court: I will take judicial notice of both of them but I have my doubts as to the applicability of 5.

Mr. McCarthy: I agree with you.

The Court: Then we will just consider it under 4.

Mr. McCarthy: Under 4. And also I believe in that respect you might also consider taking judicial notice of Chapter 5, Article 10, Section 196 of the building code. I have already put the marker there for your Honor.

The Court: What one is that?

290

Mr. McCarthy: That is Section 196 of Article 10, Chapter 5.

The Court: I don't think so. I think in the interest of safety, I think you had better stay on 4, don't you?

Mr. McCarthy: I agree with you.

The Court: That is subdivision 4 of 241 of the Labor Law.

Mr. McCarthy: That is right, sir, and I also ask your Honor to take judicial notice to the effect that that Section 4 as reproduced in 241 of the present labor law was derived in toto from the fourth sentence of the former Section 20 of the Labor Law which went into effect in 1909 pursuant to

291

the laws of this State, Chapter 36.

The Court: We are not concerned with that. That is a matter of law.

Mr. McCarthy: At this time, your Honor, the plaintiff rests.

Mr. Mellen: Do I understand then that plaintiff now is resting solely upon a claim

of a violation of subdivision 4 of Section 241 of the Labor Law?

The Court: Right.

Mr. McCarthy: Not completely, your Honor, I contend that as a matter of common law in the interests of safety and protection there was still a duty owing.

The Court: I am going to hold you to 241.

Mr. McCarthy: I will regret that I must have it noted on the record that I go in not only on the violation of the labor law, but also on the ordinary provisions of the common law regarding the negligence of a person inviting others to come to work on premises under their jurisdiction and control.

The Court: All right, if you want it. I think it only complicates it but you can do it if you like. You see what I am calling your attention to, Mr. McCarthy? If you have the common law you may have the question of contributory negligence. If you have the labor law you may not have it.

Mr. McCarthy: That is right, sir. I have given your those cases.

The Court: I am perfectly familiar with them.

Mr. McCarthy: Yes, sir, thank you.

Mr. Mellen: On behalf of the defendant I move to dismiss the complaint on the ground that the evidence is insufficient in law to establish any actionable negligence on the part of that defendant which was the proximate cause of the accident which resulted in the

death of the deceased; on the specific ground that Section 241 of the Labor Law of the State of New York has no application, for the reason that the place of the accident, both the building under construction and the land upon which it was being constructed, were within the exclusive jurisdiction of the United States by virtue of the United States Constitution, Article 1, Section 8, Clause 17; that under the evidence, exclusive jurisdiction over the place of the accident had been ceded to the United States more than about four years prior to the accident, and that for 296
that reason no statute regulating the construction of the building, such as the labor law here, would apply.

Upon the further ground that under the evidence adduced there is nothing to show even prima facie any violation of subdivision 1 of Section 241 or that any such violation was the proximate cause of the deceased's fall, or violation of any common law duty owed by the defendant to the deceased, or any duty imposed by the labor law and that there is no evidence to establish that the violation, if there was one, of the labor law, was the proximate cause of the fall.

The Court: Motion is denied. 297

Mr. Mellen: I respectfully except. Now do I understand that I am to proceed only on the theory that the sole question presented is under the labor law?

The Court: Mr. McCarthy says he wants to go under common law, too.

Mr. McCarthy: I prefer to go—in view of the objection which I knew he would make and particularly bearing in mind the decision of Kaufman against Hopper, which is before your Honor—I want to go in not only on the violation of the labor law, but also on the common law violation of the duty which was owing by this contractor to this deceased.

Mr. Mellen: Of course I submit, under the authorities that are already before your Honor, that the relationship between the defendant and the deceased was such that
299 there was no duty of affirmative action at common law by this defendant for the protection of the man under the circumstances shown here, being open, obvious dangers that had existed.

The Court: That is a question of assumption of risk. That is a matter of defense, isn't it?

Mr. Mellen: It is more than an assumption of risk.

The Court: Let's see if we understand one another. At least there is a duty owing, isn't there, to this man by this general contractor?

300 Mr. Mellen: There is only, as I understand the common law—and I may be in error; if your Honor disagrees with me I undoubtedly am, but as I understand the common law, the only duty that a general contractor owes to the employees of a sub-contractor is the same duty that he would owe to any invitee upon the property, taking

into consideration the fact that the place is a building in course of construction and that therefore it is to be measured by the situation existing.

The Court: Oh, yes. This is my thought: reasonable care in the light of the condition which the building is in.

Mr. McCarthy: That is right.

The Court: Is that your statement?

Mr. Mellen: What I understand under the decisions to be the duty of an invitee, is to advise him; you don't have to change the place. You merely have to warn him, advise him of the existence of dangers that he 302
does not know of, or hidden dangers to protect him from.

Under the evidence here, there is no question of any hidden, concealed danger. These are conditions under the evidence that had existed from the time he first came on the building. He was there at least one day prior to the day of the accident and the day of the accident, so that the conditions were something that were open, obvious, not hidden; nothing in the nature of a trap, nothing that he didn't know and was not as well aware of as the——

The Court: Aren't you now getting into 303
the question of contributory negligence?

Mr. Mellen: I don't think so, your Honor, because the measure of the duty under the Restatement is governed by whether or not it is a hidden—in other words unless it is something that he doesn't know and shouldn't know as well as the person who invites him, there is no duty.

The Court: Did you have any case on common law liability?

Mr. McCarthy: Yes, I have the Kaufman against Hopper case, your Honor, 220 New York, which has to do with practically the same situation here.

The Court: You go ahead, Mr. Mellen. I will read the case meanwhile.

CARL G. EDLUND, 201 East 16th Street, Brooklyn, N. Y., called as a witness on behalf of the 305 defendant, being duly sworn, testified as follows:

Direct examination by Mr. Mellen:

Q. Mr. Edlund, in the fall of 1935, what was your business? A. Salesman for the United Hoisting Company.

Q. Did you have anything to do with this job at the post office in New York? A. I did.

Q. Were you an officer of the United Hoist at that time? A. I believe so. In other words, I don't just quite remember when I was voted out as vice-president, but at one time I was vice-president. It might have been within that period.

306 Q. How long had you been with the United Hoisting? A. Since its incorporation in 1926.

Q. Are you familiar with the equipment that was to be installed by the United Hoist Company in this building under the contract with Stewart? A. Yes, sir.

Q. The location of that equipment? A. Yes, sir.

Q. Were you at the job before the riggers came on the job to start the installation? A. Yes, sir.

Q. Who was with you when you were there, do you remember? A. Mr. Rizzi and Mr. Finnegan, I believe.

Q. I meant of the United Hoist Company. Were there others of the United Hoist? A. Nobody else from the United Hoisting Company.

Q. Do you recall whether Mr. White, Jr., was there? A. I don't think so. I don't remember. I won't say that he was there, but I don't remember now.

Q. One of the items of equipment that was to be 308
installed, we understand, was this concrete hoist? A. Yes, sir.

Q. When and who made the determination as to the location of that hoist in the building? A. Why, I should say that there were three men that finally came to that decision, and that would be Mr. Finnegan, Mr. Sartelli and Mr. Rizzi.

The Court: Sartelli, the deceased here?

Mr. McCarthy: No, that is another one.

The Court: You have used the name so interchangeably that I can't tell.

Q. Were you a party to the conferences that led up to that decision as to the location? A. Yes, sir. 309

Q. Had the location been determined before Sadrakula or Moran, who was the superintendent, and the riggers came on the job? A. Yes, sir.

Q. Besides the hoist, the bucket hoist, what other equipment was to be installed in the vicinity, in the same section of the building, in connection with that hoist? A. A bucket, concrete mixer, Blaw-Knox material bin and weighing batchers and floor hoppers.

Q. Now, the bay in which this hoist was to go was a corner bay of the end of that section of the building in which the steel had been erected and the ramp driveway; is that correct? A. I believe, if I recall correctly, it was the second bay from that driveway. I am not so certain of that, but I believe that, if I recall correctly.

Q. Well, at any rate, on the bay to the north of that—there is a picture here, Plaintiff's Exhibit 1, that shows a hopper of some sort, bin; was that part of your equipment? A. Yes, sir.

Q. Now, you said that there was a concrete
311 mixer. Where was that to be located? A. Alongside of the bucket on the sub-basement floor.

Q. Was it on the floor or above the floor?

Mr. McCarthy: I object to that. It is already answered, if your Honor please. The witness answered that the concrete mixer was——

Mr. Mellen: All right. I will withdraw the question.

Q. Do you remember whether the top of that concrete mixer, when installed, would be above or below the first tier of steel? A. It would be below the first tier of steel.

312 Q. And where was it with reference to the bin and the hoist bucket? A. It would be alongside of the hoist bucket and between the bin, somewhat under the bin.

Q. Well, do you recall that there were three panels in the bay in which the hoist was constructed? A. Yes.

Q. And the hoist was in the middle panel? A. Yes.

Q. Where with reference to the northerly panel would the mixer come? A. Directly underneath the northerly panel, alongside of the bucket.

Q. In the operation, after installation, the operation of the bin—withdrawn. Was the bin and the mixer and the hoist part of the same equipment that were used together after they were installed? A. They are all related one to the other. In other words, there is a sequence of operation there.

Q. In operating was there an operator that would work in connection with the bin and the mixer and the bucket? A. Yes.

Q. And where would he be stationed? A. Directly over the mixer. 314

Q. When stationed at the mixer, having in mind the location of the mixer and the height of the mixer, would there be clearance for a man to stand—withdrawn. Would his head extend above the level of the first tier of steel? A. It would.

Q. In other words, if the first tier of steel were filled in there, the man couldn't stand at the concrete mixer; is that right?

Mr. McCarthy: I object to that, if your Honor please. That is a conclusion on the part of this witness.

The Court: It depends upon the size of the man. 315

Q. Do you remember what the height of the first tier of steel was above the ground, approximately? A. Approximately about 13 feet, I should say; something like that.

Q. And will you describe on this particular job just what the construction of this mixer was, what it stood on, its size, and so on? A. Well, the lowest

point of the plant in operation would be the bottom of the bucket, which in this case rested on the cement floor of the sub-basement. Then the mixer would be cribbed up—in other words, there would be lumber placed underneath the mixer to raise that up so that the mixer in turn could discharge the concrete into this bucket that was resting on the cement floor of the sub-basement. In other words, if this were the bucket, the discharge chute of the mixer would be about in this relation. And then the bin, the Blaw-Knox material bin that received the stone and the sand for the concrete,
317 would be above the batch hopper or the receiving hopper of the mixer, so that when the material had been placed in this bin the man standing on the top of the mixer would pull two levers or turn two wheels. That would discharge the sand first into one compartment of the weighing batcher. He would pull another wheel, which would discharge the sand into the other compartment of the batcher. When enough of the material had poured into there so that it was the required weight for that particular batch of concrete, then the weighing batcher would come to a certain point and would shut off that material from the bin. The next step then would be that when the required amount of material had been put in these batchers, the lever—
318 another lever—would be pulled, which would discharge the stone and sand into the receiving hopper of the mixer, which in turn would guide it into the concrete mixer. It would then turn over in the revolving drum of the concrete mixer about one and a half minutes and then in turn this same man standing on top of the mixer would push another lever which would discharge the mixed concrete into the bucket.

Q. The hoist bucket? A. The hoist bucket. Then, on a signal from an operator, why, a bell would be rung for the engineer to start his electric motor to lift the bucket up, which in turn would come up to the floor that they were pouring concrete on, and an automatic tripper fastened on the guide would trip this bucket of concrete into a floor hopper.

Q. I will call your attention to Plaintiff's Exhibit 2, which shows the bucket, hoist bucket, apparently on the floor there. Is that the bucket and would it be at that level at the time that the mixer 320
would discharge its contents into the bucket?

Mr. McCarthy: If your Honor please, I object to this testimony, assuming a statement of facts which would have occurred at a later time, subsequent to the time——

The Court: What is the object of all this?

Mr. Mellen: The purpose of this, if your Honor please, is this: The statute with regard to filling in the floor as the building progresses makes specific exception where the openings are necessary in the construction of the work and for the handling of materials.

The Court: I understand that, but you 321
are dealing now with a completed structure and completed device.

Mr. Mellen: No, I am dealing here—here is what we are dealing with, if your Honor pleases: This hoist that we have been talking about is only one part of a series of equipment that all goes to the same purpose, the handling of the concrete to take

it from floor to floor. It is a part of the handling of material. I am showing that this panel between the panel in which the hoist was located and the bin on this same floor had to be left open because it was a necessary part of that——

Mr. McCarthy: If your Honor please, that is not so and he has not proved it. He has proved or is trying to prove that by having a man stand on top of the concrete mixer he didn't have to have anybody in that whole bay. That is what he is trying to 323 prove.

Mr. Mellen: Maybe I know better what I am trying to prove.

Mr. McCarthy: Maybe you do, but it would indicate——

The Court: Wait a moment. You did so well this morning, don't start this afternoon. I don't think what you are trying to prove as to the mixer when in a state of operation, when all these units are being used, has any relationship to this situation at the time of the death of this man.

Mr. Mellen: Your Honor, I think what I am dealing with here is this—I may be wrong: The subdivision 4 of those other 321 subdivisions of Section 241 other than 5 have relation to the concrete floor being laid as the building progresses.

The Court: Except "spaces seasonably required."

Mr. McCarthy: That is "reasonably required." That is a misprint.

The Court: I understand. "Reasonably required for proper construction of the iron

or steel and for raising, lowering of materials or for stairways, elevator shafts designated by the plans and specifications."

Mr. Mellen: We are dealing here—there can't be any doubt that concrete is a material that would be used in the construction of that building.

The Court: They weren't using it then.

Mr. Mellen: If your Honor please, if I have to put in my permanent floors——

The Court: They don't say permanent floors.

Mr. McCarthy: Floor planking. 326

Mr. Mellen: It does not say a word about planking in Section 241.

Mr. McCarthy: 241 says this, if I may read, it your Honor.

The Court: It says "thoroughly planked."

Mr. McCarthy: Planked over.

The Court: It is not the permanent floor.

Mr. Mellen: I have to do one thing at a time. There are two parts of this. If I understand that, there is no claim here made that the failure to have the cement floor is one of the grounds of negligence.

The Court: They are not talking about a cement floor.

Mr. McCarthy: Didn't say a thing about it. 327

The Court: They say the statutory violation is claimed because you didn't have that floor in that locality thoroughly planked That is not a permanent floor.

Mr. Mellen: I see the point. If that is the case, I withdraw this witness, as long

as I understand that there is no claim on the absence of centering or concrete or anything there.

Mr. McCarthy: No.

The Court: All right, that is all, sir. You may take a recess.

(The Court then recessed for five minutes.)

AFTER RECESS.

Mr. Mellen: So that there will be no question
329 in the record, do I understand that no claim is made under subdivisions 1, 2 or 3 of Section 241 of the Labor Law?

Mr. McCarthy: No claim is made under that at all.

The Court: It is embodied in 4.

Mr. Mellen: And is also made under Section 196 of the Building Code?

The Court: That is right. He confines himself to 4 of 241.

Mr. Mellen: I will offer in evidence contract between the defendant Stewart and the United States of America, through the Procurement Division of the Treasury Department, dated—I think
330 it is November 9, 1934. And I want to call attention particularly to the things that I have in mind, two sections of the specifications which by reference are made a part of the contract.

Mr. McCarthy: May I see those, please?

The Court: Yes. Show them to Mr. McCarthy first.

Mr. McCarthy: I object to those as not binding in this matter.

The Court: Is that what you have got marked "Copy" here?

Mr. Mellen: No. I will point it out to your Honor.

The Court: Is it going to be your claim that those two sections define the duty?

Mr. Mellen: It is my claim, if your Honor please, that under those two sections and within the authority of that case that I cited to you, your Honor, the United States Government through proper authority has specifically limited and exempted from application and declared a policy that those provisions are not applicable. 332

The Court: I will exclude them. I sustain the objection.

Mr. Mellen: May I, for the purpose of the record, have an offer of proof——

The Court: We will mark them for identification, those two sections. They are Division 1, Sections 21 and 22.

Mr. Mellen: Yes. I will have to substitute at a later time another copy that we can agree upon between us.

The Court: That will be agreeable.

Mr. McCarthy: Oh, yes.

The Court: There will be no trouble about that.

Mr. Mellen: They will be marked for identification? 333

The Court: Division 1, paragraphs 21 and 22.

Mr. Mellen: That is correct.

The Court: Entitled, "Protection of Public Property"—21 and 22.

Mr. Mellen: And an exception to the exclusion.

The Court: Yes.

(Considered marked Defendant's Exhibit A for Identification.)

Mr. Mellen: Defendant rests.

Mr. McCarthy: No rebuttal.

Mr. Mellen: On behalf of the defendant I renew the motion made at the close of the plaintiff's case to dismiss the complaint upon the same grounds then stated, upon the additional ground that under all of the evidence Section 241, subdivision 4 of the Labor Law imposes no duty upon the defendant under the conditions disclosed by the evidence, in that that section applies only to the floor or the tier of steel upon which the structural steel is being erected, and not to a lower floor as it is the case here, and upon the additional ground that under
335 the evidence it appears affirmatively that at the point of the accident in this particular bay was under the exclusive control at the time of the accident of the deceased's employer and himself.

The Court: Denied.

Mr. Mellen: May I also have a motion for the direction of a verdict for the defendant upon the same grounds?

The Court: Denied.

Mr. Mellen: Exception to both.

The Court: Mr. McCarthy is not going under the theory of common law at all.

Mr. McCarthy: I have withdrawn that. The particular negligence in this case is predicated directly upon subdivision 4 of Section 241 of the
336 Labor Law.

The Court: All right.

Mr. Mellen: Then, on behalf of the defendant, I renew the motion for the direction of a verdict in favor of the defendant on the specific ground that Section 241, 4 of the Labor Law is not applicable to the place of the accident and that applica-

tion thereof to the place of the accident is in violation of Article 1, Section 8 of the United States Constitution.

The Court: Denied.

Mr. Mellen: Exception.

The Court: Do you want to submit it as a question of law and fact to me without a jury? Use your own judgment. You are not offending me one way or the other. It has advantages and some disadvantages. The disadvantages are mine.

Mr. Mellen: I am willing. I would have to communicate with the attorney of record. I am sure he would approve my——

338

The Court: Think it over for five minutes, and if you want to——

Mr. Mellen: I forgot that I haven't the last say. I am only trial counsel.

The Court: Do you want to consider it for awhile?

Mr. McCarthy: I would like to. I am really trial counsel in this thing, too.

(A recess was taken for a few minutes.)

AFTER RECESS.

The Court: Members of the jury: By consent of counsel, the case is going to be submitted to me without your aid. So that you may go back to the central jury part. I will dispose of it here.

339

Mr. Mellen: For the purpose of the record, if your Honor please, may the defendant be permitted to reopen for the purpose of including in its proof a stipulation that on the day of the accident no steel was being erected on the floor from which the deceased fell and that the erection of steel had been

completed to a point beyond and above that floor prior to that day?

Mr. McCarthy: That is what I gathered from the evidence.

The Court: All right. That is admitted.

Mr. Mellen: Then I suppose for the record all that is necessary is for counsel to join in the motion for a direction of a verdict?

The Court: Both sides move for the direction of a verdict and that the questions of law and fact are submitted to the Court and no findings need be made.

341 Mr. Mellen: Only to this extent, if your Honor please: In the decision I would like to have it appear, in the event that there is a general finding against the defendant, whether the Court holds that the doctrine of volenti non fit injuria is applicable as a matter of law and whether or not contributory negligence is a defense as a matter of law.

The Court: I am going to hold that contributory negligence, if established, if I find it, is a bar to recovery. I will tell you that now.

Mr. Mellen: On the question whether or not there is any assumption of risk, if your Honor can determine that at the time, just so that the record will show whether that is decided as a matter of fact or as a matter of law.

342 The Court: All right. Do you want to submit a short memorandum?

Mr. Mellen: I will be delighted to.

Mr. McCarthy: I think I have about exhausted what little law I have.

The Court: Can you get one up in forty-eight hours, and especially on the assumption of risk?

Mr. Mellen: To-day is Tuesday.

The Court: There will be no court on Thursday and Friday. Monday.

Mr. Mellen: If I can have it in by Saturday or Monday morning I can do it very nicely.

The Court: Monday morning, but serve a copy on Mr. McCarthy or the attorneys on Saturday, if you will.

Mr. McCarthy: I think your Honor will take judicial notice of the expectancy of life of this plaintiff.

The Court: Yes, I will do that.

344

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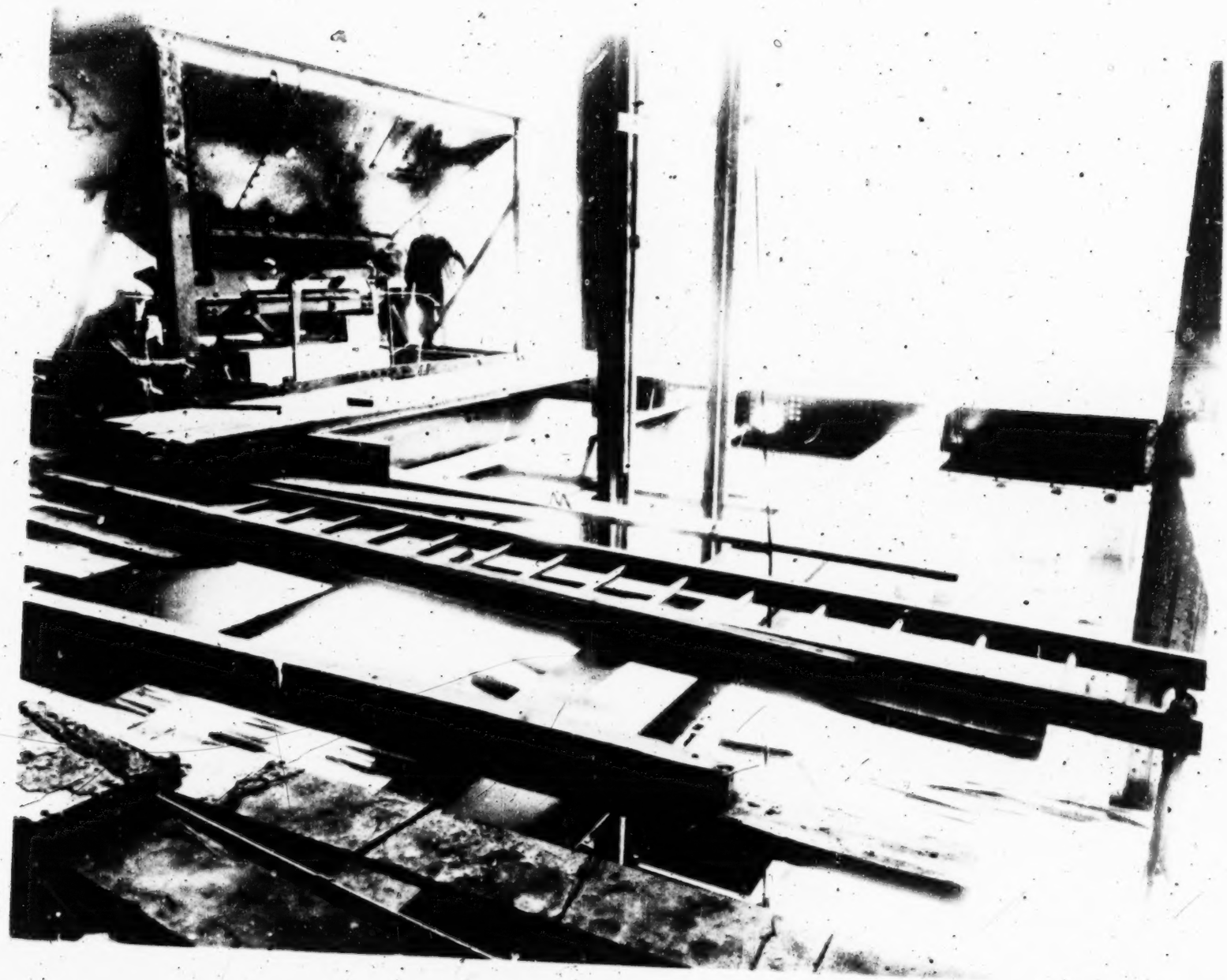
Plaintiff's Exhibit 1.

Photograph.



Plaintiff's Exhibit 2.

Photograph.

352 **Plaintiff's Exhibit 3.**

THIS AGREEMENT made and entered into this 15th day of August, 1935, in the City of New York, by and between JAMES STEWART & Co. INC., hereinafter called the Contractor, and UNITED HOISTING Co. INC., Locust Avenue and 135th Street, New York City, hereinafter called the Sub-Contractor,

WITNESSETH:

The Sub-Contractor hereby agrees to furnish and install for the use of the Contractor at the building site, as long as may be required, and to remove from the site when so ordered by the Contractor,
353 all the equipment listed below to be used in connection with the construction of the Federal Office Building for the United States Government at Barclay to Vesey Streets and Church Street to West Broadway, New York City, for which the Contractor agrees to pay the Sub-Contractor as follows:

	Delivery-Installation-Removal Charges	*Rental Charges*
MATERIAL BIN:		
1 Bin, as required, with Volumetric Batcher	$600.00	Installation Charges include 22 Wks. Rental
At the Contractor's option Sub-Contractor agrees to furnish Blaw Knox Weighing Batcher, in which case there will be added to the above	$250.00	$7.20 per wk. after 22 weeks.
CONCRETE MIXER:		
354 1 28-S Mixer on skids, equipped with batch hopper, power discharge and water tank and driven by A.C. Motor, all necessary wiring included	$200.00	$50.00 per week for 1st 6 wks. $40.06 per week for next 6 wks. $30.00 per week thereafter.
HOIST:		
1 125 HP or larger capacity as may be required A.C. Electric Single Drum Hoist with concrete bucket equipment, capacity 36 cu. ft. or greater, including necessary rigging	$119.00	$62.50 per wk.
Wiring up to 100 ft.	$ 70.00	
Wiring beyond 100 ft.	60¢ Lin. Ft.	

	Delivery-Installation-Removal Charges	*Rental Charges*
FLOOR HOPPER:		
1 32' or 65-foot (as required) collapsible floor hopper...	$ 10.00	$ 5.00 per wk.
PLATFORM HOIST:		
1 30 HP Single Drum A.C. Electric Hoist with 3-wheelbarrow platform equipment, to run the full height of the building, including all rigging and raising or lowering from time to time as required..	$112.00	$30.00 per wk.
Wiring for first 100 ft.....	$ 25.00	
Additional Wiring over 100 ft..	20¢ Lin. Ft.	

All of the above equipment is to be completely 356
installed, tested and made ready by the Sub-Contractor for the Contractor's use, and it is understood and agreed that if, in the Contractor's opinion, any or all of this equipment should prove inadequate or unsatisfactory, the Sub-Contractor shall immediately, at his own expense, remove the same and replace with other equipment satisfactory to the Contractor.

Each item of equipmem shall be installed as soon as required by the Contractor, and in the event of failure or breakdown during operation the Sub-Contractor shall make immediate repairs or replacements so that there will be no delay in the Contractor's operations. Each item shall be 357
dismantled and removed as soon as so ordered by the Contractor, and the Sub-Contractor shall immediately remove all debris caused by its workmen.

The Sub-Contractor shall be responsible for all claims for injuries to persons or property employed by the Sub-Contractor or others, or to the public, arising from defects in the Sub-Contractor's equipment or from the acts of its employees during the

progress of the work, and against such liability the Sub-Contractor shall take out and pay for proper and adequate insurance in amounts of not less than $50,000 100,000 limits, certificates of which shall be filed by the Sub-Contractor with the Contractor. The Sub-Contractor shall also take out and pay for Workmen's Compensati n Insurance, certificates of which shall also be filed with the Contractor.

It is understood and agreed that all of the above prices are subject to a cash discount of 2% for payment within ten (10) days after receipt of in-
359 voices for amounts due to preceding month.

In Witness Whereof, the parties hereto have set their hands and seals this 15th day of August, 1935.

JAMES STEWART & COMPANY, Inc.
(Seal) By (signed) Harry D. Watts,
Vice President.

Witness:

(Signed) C. J. Schneider

UNITED HOISTING CO. Inc.
(Seal) By (signed) Edward A. White,
360 President.

Witness:

(Signed) J. M. Clements

Defendant's Exhibit A for Identification. 361

Contract between James Stewart & Co., Inc., and the United States of America, Treasury Department, Procurement Division, dated November 9, 1931, referred to in paragraph "Second" of the Amended Complaint, in which said James Stewart & Co., Inc., is described as "the contractor," contained the following provisions, among others:

"21. PROTECTION OF PUBLIC AND PROPERTY. —The contractor shall protect all materials and work, whether incorporated in the building or not, against injury from any cause, and shall provide and maintain all necessary guards, lights, etc., for the protection of the 362
public, and he shall comply with all Municipal ordinances which apply to the use of sidewalks and streets or alleys for building operations, but such ordinances do not apply inside of the lot lines. He shall be held responsible for any damage or injury to persons or property which may occur as a result of his fault or negligence in the prosecution of the work.

"22. PERMITS.—The contractor shall without additional expense to the Government obtain all required licenses, permits, etc. This applies to work outside the lot lines, the use of streets and sidewalks, the protection of public and traffic, connections to utility service 363
lines, etc. State or Municipal Building Regulations do not apply to work inside the Government's lot lines."

364 **Statement as to Evidence.**

The foregoing case contains all of the evidence adduced and proceedings had upon the trial of this action, together with the exceptions of both sides taken on said trial.

Corrected Opinion by Lewis, J., Dated November 30, 1937.

SUPREME COURT,

TRIAL TERM—PART VIII.

365

BY MR. JUSTICE LEWIS.

Sadrakula, as adm'x, &c., v. James Stewart & Co., Inc., and ano. (corrected)—Action by the plaintiff against the general contractor, James Stewart & Co., Inc., for damages resulting from the death of her husband, an employee of a subcontractor. The proximate cause of the accident which occasioned decedent's death was the failure of the defendant to thoroughly plank over the beams as required by section 241, subdivision 4, of the Labor Law. The defense of assumption of risk is not maintainable where, as here, the relationship of master and servant did not exist. There was likewise a failure to establish that plaintiff's decedent was guilty of any contributory negligence. I direct judgment in favor of the plaintiff for the sum of $23,125.

366

LEWIS,
J. S. C.

Stipulation Settling Case.

367

IT IS HEREBY STIPULATED that the foregoing record contains all the evidence given upon the trial of this action, together with the exceptions of both sides taken on said trial, and that the same be settled and ordered on file as the case on appeal and annexed to the judgment roll herein.

Dated, New York, February 10, 1938.

FREDERICK MELLOR,
Attorney for Defendant-Appellant.

McCARTHY, FIXLER & STEWART,
Attorneys for Plaintiff-Respondent. 368

Order Settling Case.

On the above stipulation, I HEREBY CERTIFY that the foregoing record contains all of the evidence adduced and proceedings had upon the trial of this action, together with exceptions of both sides taken on said trial, and said case is hereby settled and ordered on file as the case on appeal in this action.

Dated, New York, February 14, 1938.

HARRY E. LEWIS, 369
J. S. C.

370 **Stipulation Waiving Certification.**

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, judgment roll and case and exceptions as settled, and of the whole thereof, now on file in the office of the Clerk of the County of Kings, and that certification thereof by the Clerk of said County, pursuant to Section 616, is hereby waived.

Dated, New York, February 10, 1938.

FREDERICK MELLOR,
Attorney for Defendant-Appellant.

371

McCARTHY, FIXLER & STEWART,
Attorneys for Plaintiff-Respondent.

Order Filing Record in Appellate Division.

Pursuant to Section 616 of the Civil Practice Act, it is

ORDERED that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the Second Department.

372

Dated, New York, February 14, 1938.

HARRY E. LEWIS,
J. S. C.

Notice of Appeal to Court of Appeals.

SUPREME COURT,

KINGS COUNTY.

KATHERINE SADRAKULA, as Admx. of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Plaintiff-Respondent.

against

JAMES STEWART & Co., INC.,
Defendant-Appellant.

Sirs:

PLEASE TAKE NOTICE that the defendant, James Stewart & Co., Inc., hereby appeals to the Court of Appeals of the State of New York from the judgment entered herein in the office of the Clerk of the County of Kings on or about the 27th day of June, 1938, for the sum of $95.97 costs and affirming the judgment entered herein in the office of the Clerk of Kings County on or about the 24th day of November, 1937, in favor of the plaintiff and against the defendant, for the sum of $26,197.08, and affirming also an order made by the Court denying the defendant's motion for a new trial, and the said defendant, James Stewart & Co., Inc., will bring up for review upon said appeal, the order of the Appellate Division of the Supreme Court, Second Judicial Department, dated June 17, 1938, upon which said judgment of affirmance was entered, and the said defendant hereby appeals from

376 *Notice of Appeal to Court of Appeals.*

each and every part of said judgment and order, as well as from the whole thereof.

Dated, New York, N. Y., August 23, 1938.

Yours, etc.,

FREDERICK MELLOR,
Attorney for Defendant-Appellant,
No. 60 John Street,
Borough of Manhattan,
New York City, N. Y.

377 To:

CLERK OF THE COUNTY OF KINGS.

McCARTHY, FIXLER & STEWART,
Attorneys for Plaintiff-Respondent,
165 Broadway,
Borough of Manhattan,
New York, N. Y.

378

Order of Affirmance.

379

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department, at the Borough of Brooklyn, on the 17th day of June, 1938.

Present,—Hon. Edward Lazansky,
Presiding Justice,
" William F. Hagarty,
" William B. Carswell,
" Rowland L. Davis,
" George H. Taylor, Jr.,
Justices.

380

Katherine Sadrakula, as administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased, Respondent, against James Stewart & Co., Inc., Appellant.	Order on Appeal from Judgment.

381

The above-named James Stewart & Co., Inc., the defendant in this action, having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Kings on the 24th day of November, 1937, herein, and the said appeal having been argued by Mr. Clarence E. Mellen, of counsel for the appellant, and argued by Mr. Leo Fixler, of counsel for the respondent, and due deliberation having been had thereon,

382 *Order of Affirmance.*

IT IS ORDERED AND ADJUDGED that the judgment so appealed from be and the same hereby is unanimously affirmed, with costs.

Enter,

E. L.,
P. J.

Judgment of Affirmance.

SUPREME COURT

383 OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

KATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Plaintiff,

against

JAMES STEWART & CO., INC.,
Defendant.

384

The above named defendant, James Stewart & Co., Inc., having appealed to the Appellate Division, Supreme Court, Second Department, from the judgment of the Supreme Court entered in the office of the Clerk of the County of Kings on the 24th day of November, 1937, in favor of the plaintiff and

against the defendant for the sum of Twenty-six Thousand One Hundred Ninety-seven and 08/100 ($26,197.08) Dollars, and the said Appellate Division of the Supreme Court having rendered its decision unanimously affirming said judgment with costs to the plaintiff, and a certified copy of the order of the Appellate Division having been duly filed, together with the record in the office of the Clerk of the County of Kings, and said costs having been duly taxed by the Clerk of the Court,

Now, on motion of McCarthy, Fixler & Stewart, attorneys for the plaintiff, it is 386

ORDERED AND ADJUDGED, that the judgment so appealed from be and the same is hereby in all things confirmed, and it is further,

ADJUDGED, that the plaintiff, Katherine Sadrakula, as administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased, recover from the defendant, James Stewart & Co., Inc., the sum of $95.97/100, the cost of said appeal, and that the plaintiff have execution therefor.

Judgment signed and entered this 27th day of June, 1938.

JOHN N. HARMAN, 387
Clerk.

388 **Order on Motion for Leave to Appeal.**

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twenty-ninth day of November, A. D. 1938.

Present:

HON. FREDERICK E. CRANE,
Chief Judge, presiding.

389

KATHERINE SADRAKULA, as Admrx., &c., of Nicholas Sadrakula, deceased,
Respondent,

vs.

JAMES STEWART & CO., INC.,
Appellant.

A MOTION for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and
390 papers having been duly submitted thereon, and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements on the ground that an appeal has been properly taken as of right.

A Copy

RUFUS KIMBALL,
Deputy Clerk.

Memorandum of Appellate Division, Second Department. 391

SUPREME COURT,

APPELLATE DIVISION—SECOND DEPARTMENT.

KATHERINE SADRAKULA, as Administratrix, etc., of Nicholas Sadrakula,

Respondent,

vs.

JAMES STEWART & CO., INC.,

Appellant.

392 PRESENT—Lazansky, P. J., Hagarty, Carswell, Davis and Taylor, Jr., JJ.

Action for damages for the death of plaintiff's decedent as a consequence of a violation by the defendant of Section 241, subdivision 4, Labor Law, in the course of the erection of a Federal post office building.

Judgment for plaintiff unanimously affirmed, with costs. (a) The evidence adequately established that the proximate cause of the decedent's death was defendant's failure to plank over the steel beams in the western area of the "bay" as required by Section 241, subdivision 4, Labor Law. (b) The labor law provision was in effect at the place of the accident because that statute was 393 enacted prior to the acquisition of the property by the Federal Government. The common law and statutes in effect before the act of cession remain in force until displaced by Congress (Kaufman v. Hopper, 220 N. Y. 184, 187, 115 N. E. 470, and cases cited therein). There has been no action by Congress displacing the Labor Law in respect of this Federal reservation. Such Federal action as has taken place is confirmatory of plaintiff's right to invoke the applicable State statutes (45 Stat. 54, tit. 16, U. S. Code, sec. 457).

394 **Waiver of Certification in Court of Appeals.**

Pursuant to Section 170 of the Civil Practice Act,

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the preceding papers, as hereinbefore printed, consist of true and correct copies of the notice of appeal to the Court of Appeals, the order of affirmance and the judgment of affirmance appealed from, the order on motion for leave to appeal and the printed record upon which the Appellate Division acted in making the order of affirmance, and the whole thereof, now on file in the office of the Clerk of the County of Kings.

395 Certification thereof, in pursuance of Section 616 of the Civil Practice Act, is hereby waived.

Dated, New York, December , 1938.

FREDERICK MELLOR,
Attorney for Defendant-Appellant.

MCCARTHY, FIXLER & STEWART,
Attorneys for Plaintiff-Respondent.

396

[fol. 133] **IN COURT OF APPEALS OF NEW YORK**

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany on the 4th day of April in the year of our Lord one thousand nine hundred and thirty nine before the judges of said Court

Witness

The Hon. Frederick E. Crane, Chief Judge Presiding.
John Ludden, Clerk.

KATHERINE SADRAKULA as Admrx., etc., Respondent

ag'st

JAMES STEWART & Co., INC., Appellant

REMITTITUR—April 5, 1939

Be It Remembered, That on the 9th day of January in the year of our Lord one thousand nine hundred and thirty-nine, James Stewart & Co., Inc., the appellant in this cause came here unto the Court of Appeals by Frederick Mellor, its attorney and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Katherine Sadrakula as administratrix etc. the respondent in said cause afterward appeared in said Court of Appeals by McCarthy, Fixler & Stewart her attorneys.

Which said Notice of Appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon, The Said Court of Appeals having heard this cause argued by Mr. Clarence E. Mellen, of counsel for the appellant and by Mr. Leo Fixler, of counsel for the [fol. 134] respondent and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court be remitted to the Said Supreme Court there to be proceeded upon according to law.

And afterwards, to wit on the 21st day of April, 1939, an order was duly made amending the remittitur herein, a

certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto as aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York, Court of Appeals, Clerk's Office, Albany, April 5, 1939.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal of the Court of Appeals, State of New York.)

[fol. 135] In Court of Appeals of New York

[Title omitted]

Order Amending Remittitur—April 21, 1939.

A motion to amend the remittitur in the above cause having been heretofore made herein upon the part of appellant, papers having been submitted in support of said motion and in opposition thereto and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and remittitur amended by adding thereto the following:

"A question under the Federal Constitution was presented and necessarily passed upon by this Court. The appellant contended that Section 241, sub-division 4 of the Labor Law of the State of New York (Consolidated Laws

of New York, Chapter 31, Section 241, sub-division 4) insofar as the said law is construed to apply to the construction and erection of a post office building pursuant to a contract with the Treasury Department of the United States, upon land within the exterior boundaries of the State of New York but which is within the exclusive jurisdiction of the United States under Article 1, Section 8, Clause 17 of the Constitution of the United States, is repugnant to the Constitution and laws of the United States in that it offends Article 1, Section 8 of the Constitution of the United States and Title 40 U. S. Code, Sections 285, 341 and 342 (30 U. S. Stat. 614; 44 U. S. Stat. 630, 631) and is invalid when so applied.

This Court held that the aforesaid Labor Law of the State of New York is valid and not repugnant to any provision of the Constitution of the United States."

And, the Supreme Court, Kings County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Rufus Kimball, Deputy Clerk.

A copy.

[fol. 136] In Supreme Court of New York, County of Kings

Present: Hon. Edward Riegelmann, Justice.

Katherine Sadrakula, as Administratrix of the Goods, Chattels and Credits Which Were of Nicholas Sadrakula, Deceased, Plaintiff,

vs.

James Stewart & Co. Inc., Defendant

Order on Remittitur—April 10, 1939

Upon reading the annexed affidavit of Leo Fixler, Esq., of counsel for McCarthy, Fixler & Stewart, the attorneys for the plaintiff herein, duly sworn to the — day of April, 1939, and upon all the proceedings and pleadings heretofore had herein, and upon the remittitur of the Court of Appeals filed in the office of the Clerk of the County of Kings, on the 10th day of April, 1939, which remittitur is

dated April 5th, 1939 and the certified copy of the judgment and order of the Court of Appeals attached to and — part of the said remittitur, it is hereby

Ordered, Adjudged and Decreed, that the said judgment and order of the Court of Appeals be and the same is hereby made the judgment and order of this Court.

Enter.

E. R., J. S. C.

Granted April 10th, 1939. John N. Harman, Clerk.

[fol. 137] In Supreme Court of New York, County of Kings

[Title omitted]

Affidavit of Leo Fixler

Leo Fixler, being duly sworn, deposes and says:

That he is an attorney associated with the firm of McCarthy, Fixler & Stewart, the attorneys for the plaintiff herein.

That this is an action to recover damages for the wrongful death of plaintiff's decedent.

That after a trial before Hon. Justice Harry E. Lewis, a verdict was rendered in favor of the plaintiff and judgment entered thereupon.

That thereafter the defendant appealed to the Supreme Court, Appellate Division, Second Department and as a result of said appeal, the judgment in favor of the plaintiff was affirmed.

That thereafter, the defendant by its attorney, appealed to the Court of Appeals.

That as a result of such appeal, the Court of Appeals affirmed said judgment and order with costs.

That the remittitur of the Court of Appeals is dated April 5th, 1939 and said remittitur, together with certified [fol. 138] copy of the order and judgment of the Court of Appeals was filed in the office of the Clerk of the County of Kings on the 10th day of April, 1939.

Wherefore, deponent respectfully prays that the annexed order rendering the judgment and order of the Court of Appeals, the judgment and order of this Court be signed.

No previous application for the relief prayed for herein has been made.

Leo Fixler.

Sworn to before me this 10th day of April, 1939.
Edward J. Pacelli, Notary Public, Kings County.

[fol. 139] In Supreme Court of New York, County of Kings

Katherine Sadrakula, as Administratrix of the Goods, Chattels and Credits Which Were of Nicholas Sadrakula, Deceased, 148 No. 9th St., B'klyn, Plaintiff,

vs.

James Stewart & Co. Inc., 230 Park Ave., N. Y. C., Defendant

Judgment on Remittitur—April 13, 1939

The above named defendant, James Stewart & Co. Inc., having appealed to the Court of Appeals from the order and judgment of affirmance of the Appellate Division of the Supreme Court in and for the Second Department, which judgment was entered in the office of the Clerk of the County of Kings on the 27th day of June, 1938, and the said Court of Appeals having rendered its decision affirming the said judgment and order with costs to the plaintiff-respondent and a certified copy of the order of the said Court of Appeals having been duly filed together with the record in the office of the Clerk of the County of Kings and an order having been granted on the 10th day of April, 1939, rendering the order and judgment of the Court of Appeals, the order and judgment of this Court, and said costs having been duly taxed by the Clerk of this Court,

Now, on motion of McCarthy, Fixler & Stewart, attorneys for the plaintiff, it is

Ordered and Adjudged, that the judgment and order so appealed from be and the same hereby are in all things affirmed and it is further

Adjudged that the plaintiff, Katherine Sadrakula, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased, recover of the de-

fendant, James Stewart & Co. Inc., the sum of $138.53, [fol. 140] costs of said appeal, and that the plaintiff have execution therefor.

Judgment Signed and Entered This 13 Day of April, 1939.

John N. Harman, Clerk.

[fol. 140½] Sir:

Please take notice that the within is a true copy of a judgment this day made and entered herein in the office of the Clerk of this Court.

Dated, N. Y., April 13th, 1939.

Yours, etc., McCarthy, Fixler & Stewart, Attorneys for Plaintiff, Office and Post Office Address, 165 Broadway, Borough of Manhattan, New York City.

To Frederick Mellor, Esq., Attorney for Defendant.

Due and timely service of a copy of the within Judgment is hereby admitted.

Dated, N. Y., April 13, 1939.

[Name illegible], Attorney for ——.

[fol. 141] Supreme Court of the United States

[Title omitted]

Petition for Appeal

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioner, James Stewart & Co., Inc., respectfully shows:

Petitioner is the appellant in the above entitled action.

Appellee, Katherine Sadrakula, as administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased, commenced this action in the Supreme Court of the State of New York, Kings County, on January 16, 1936, under the New York Decedent Estate Law, Section 130, (Consolidated Laws of New York, Chapter 13, Section 130) to recover damages for the death of her intestate [fol. 142] through the alleged negligence of appellant. Issue was joined therein and a jury having been waived, the

action was tried by the Court and a decision was rendered in favor of appellee (plaintiff below) upon which, on November 24, 1937, judgment was duly entered against appellant in the sum of $26,197.08.

Upon the trial, it was conceded that appellee's intestate died on October 24, 1935, as a result of injuries received that day, in falling to the sub-basement floor, from the basement floor, of a post office and federal office building, which appellant, as general contractor, was constructing pursuant to a contract with the Treasury Department of the United States, upon land owned by the United States.

It was also conceded that this land had been purchased by the United States in 1931, in separate parcels, at private sale, with the consent of the Legislature of the State of New York, for the purpose of erecting thereon a necessary post office and office building. Exclusive jurisdiction thereof was ceded to the United States by Consolidated Laws, Chapter 57, Sections 50, 53 (State Law, Sections 50, 53).

[fol. 143] Appellant's alleged liability for the death of appellee's intestate was predicated upon the sole ground that his death was proximately caused by appellant's failure to comply with the Labor Law of the State of New York, Section 241, subdivision 4 (Consolidated Laws of New York, Chapter 31, Section 241) by having the tier of beams at the floor level from which he fell "thoroughly planked over". The pertinent part of that statute, as in effect from and after April 19, 1930, read:

"Protection of Employees on Building Construction or Demolition Work. All contractors and owners, when constructing or demolishing buildings, shall comply with the following requirements: * * *

4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces seasonably required for proper construction of the iron or steel work, for raising or lowering of material or for stairways and elevator shafts designated by the plans and specifications."

Appellant raised the question of the applicability of that statute to the place where the accident occurred upon the

ground that that building was being constructed for the United States, upon land which was within the exclusive [fol. 144] jurisdiction of the United States, and claimed that if said statute of the State of New York were applied thereto it would violate Article 1, Section 8 of the Constitution and the Laws of the United States. That question was presented at the trial by appellant's motions to dismiss appellee's complaint and for the direction of a verdict in its favor. The decision of the Supreme Court of the State of New York, Kings County, was in favor of the applicability of said New York statute to said Federal work in Federal territory and of the validity thereof when so applied.

Appellant thereupon appealed from said judgment to the Appellate Division of the Supreme Court of the State of New York, Second Department, and in its brief and argument therein again urged that such application of the New York Labor Law was repugnant to the Constitution and Laws of the United States. The decision of the said Appellate Division of the Supreme Court, Second Department, was in favor of the validity of said State statute when so applied and its judgment of affirmance of said judgment against appellant was duly entered on June 27, 1938.

[fol. 145] Appellant then appealed to the Court of Appeals of New York, as of right, pursuant to Section 588, subdivision 1 of the New York Civil Practice Act upon the ground that the judgment appealed from was entered upon a decision in an action wherein "the construction of the Constitution of the United States" was "directly involved".

In its briefs and argument in the New York Court of Appeals, appellant again contended that the application of the New York Labor Law in this case was repugnant to the Constitution and Laws of the United States, but the Court of Appeals decided in favor of the validity thereof and has affirmed the judgment against appellant and decided that the New York Labor Law, Section 241, subdivision 4 was properly applied to the construction of a building for the United States, in a place within the exclusive jurisdiction of the United States and is not repugnant to the Constitution and Laws of the United States when so applied.

The Remittitur of the Court of Appeals, as amended, has been filed with the Clerk of the Supreme Court in Kings County and the judgment of the Court of Appeals made the

judgment of the Supreme Court by judgment filed on the 13th day of April, 1939.

[fol. 146] The Court of Appeals is the highest Court of the State of New York in which a decision in this case can be had. There is drawn in question the validity of a statute of the State of New York on the ground that said statute is repugnant to the Constitution and Laws of the United States, and the decision is in favor of the validity of said statute notwithstanding your petitioner's contention that as applied and enforced in this cause, said statute violates Article 1, Section 8 of the Constitution of the United States and United States Code, Title 40, sections 285, 341, 342 (30 Stat. 614; 44 Stat. 630, 631.)

That, therefore, in accordance with Section 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928 was passed, to wit, under Section 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment [fol. 147] of errors, filed herewith, pursuant to Rules 9 and 46(2) of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12(1) and 46(2) of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Court of Appeals of the State of New York, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of New York may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of New York, County of Kings, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the supersedeas bond tendered by the peti-

[fol. 148] tioner be approved and that the said appeal may operate as a supersedeas.

Dated, June 16th, 1939.

Clarence E. Mellen, Frederick Mellor, Attorneys for Petitioner.

[fol. 149] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The appellant assigns the following errors in the record and proceeding in this case:

1. The State Court erred in holding that New York Labor Law, Section 241, subdivision 4 (Consolidated Laws of New York, Chapter 31, Section 241, subdivision 4) when applied to a post office building which is being erected for the United States, in a place which is within the exclusive jurisdiction of the United States, is valid and does not violate the provisions of Article 1, Section 8, of the Constitution of the United States.

2. The State Court erred in holding that New York Labor [fol. 150] Law, Section 241, subdivision 4 (Consolidated Laws of New York, Chapter 31, Section 241, subdivision 4) when applied to a place which had been purchased by the United States, with the consent of the Legislature of said State, for the purpose of erecting needful buildings thereon and as to which said State had ceded exclusive jurisdiction to the United States, is valid and does not violate the provisions of Article 1, Section 8 of the Constitution of the United States.

3. The State Court erred in holding that the said New York Labor Law, Section 241, subdivision 4, when so applied as to control and restrict the manner and method of constructing a post office building owned by the United States, is valid and does not violate Article 1, Section 8 of the Constitution of the United States, and United States Code, Title 40, Sections 285, 341 and 342 (30 Stat. 614; 44 Stat. 630, 631).

4. The State Court erred in holding that appellant violated Section 241, subdivision 4 of the said New York Labor Law.

5. The State Court erred in holding that the death of appellant's intestate was caused by a violation of Section 241, subdivision 4 of the said New York Labor Law.

[fol. 151] 6. The State Court erred in holding that Defendant's Exhibit A for Identification, a part of the contract between appellant and the United States, containing a provision that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines" was properly excluded from evidence when offered by appellant.

Wherefore, on account of the errors hereinbefore assigned, appellant prays that the said judgment of the Court of Appeals and the said judgment of the Supreme Court of the State of New York, entered thereupon in the above entitled cause on the 13th day of April, 1939, be reversed, and judgment directed to be entered in favor of the appellant.

Dated, June 16, 1939.

Clarence E. Mellen, Counsel for Appellant.

[fol. 152] Supreme Court of the United States

[Title omitted]

Order Allowing Appeal

The petition of James Stewart & Co., Inc., the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of New York, entered upon the remittitur of the Court of Appeals of the State of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and prayer for reversal, and statement as to jurisdiction, all as provided by the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from a final judgment [fol. 153] dated the 13th day of April, 1939, of the Supreme Court of the State of New York, as prayed in said petition,

and that the Clerk of the Supreme Court of the State of New York, in the County of Kings, shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said court, a true copy of the material parts of the record herein, which shall be designated by a praecipe or stipulation of the parties, or their counsel herein, all in accordance with the Rules of the Supreme Court of the United States.

It Is Further Ordered that the said appellant shall give a good and sufficient bond, in the sum of Thirty-two Thousand, Five Hundred Dollars ($32,500), that said appellant shall prosecute said appeal to effect and answer all damages and costs if he fail to make his plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

Dated, June 22nd, 1939.

(Signed) Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 154] Citation in usual form showing service on McCarthy, Fixler & Stewart filed June 22, 1939, omitted in printing.

[fol. 155] Supersedeas bond on appeal for $32,500.00 approved June 22, 1939, omitted in printing.

[fol. 156] Supreme Court of the United States

[Title omitted]

Stipulation as to Transcript of Record

It Is Hereby Stipulated by counsel for both sides in the above cause that the Clerk in making up the transcript shall follow the papers and records as shown in the return and transcript on file in the Court of Appeals and in the Supreme Court of the State of New York, making the order and judgment of the Court of Appeals the judgment of said Supreme Court, together with papers filed by the authority

of Rule 12 of the Rules of the Supreme Court of the United States without omission or addition.

Dated, June 22nd, 1939.

Clarence E. Mellen, Frederick Mellor, Attorneys for Appellant. McCarthy, Fixler & Stewart, Attorneys for Appellees.

[fol. 157] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD Filed Aug. 1, 1939

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated, New York, July 31, 1939.

Clarence E. Mellen, Counsel for Appellant.

Service of a copy of the within statement admitted this 31 day of July, 1939.

McCarthy, Fixler & Stewart, Attorneys for Appellees.

[fol. 158] [File endorsement omitted.]

Endorsed on cover: File No. 43,658. New York, Supreme Court. Term No. 251. James Stewart & Co., Inc., Appellant, vs. Katherine Sadrakula, as Administratrix of the Goods, Chattels and Credits which were of Nicholas Sadrakula, Deceased. Filed August 1, 1939. Term No. 251, O. T., 1939.

AUG 1 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 251

JAMES STEWART & CO., INC.,

Appellant,

vs.

KATHERINE SADRAKULA, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF NICHOLAS SADRAKULA, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

CLARENCE E. MELLEN,
FREDERICK MELLOR,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	1
Date of judgment and date of application for appeal	2
Statute of the State of New York, the validity of which is involved	2
Nature of case	4
State of proceedings at which, and manner in which, the Federal questions sought to be reviewed, were raised in the Court of First Instance and in the Appellate Courts and the way in which they were passed upon in those courts	8
Grounds upon which it is contended that the questions involved are substantial	10
Cases believed to sustain jurisdiction	14
Exhibit "A"—Opinion of the Appellate Division of the Supreme Court of the State of New York	16

Table of Cases Cited.

Arizona v. *California*, 283 U. S. 423	11
Arlington Hotel Co. v. *Fant*, 278 U. S. 439	11
Barrett v. *Palmer*, 162 U. S. 399	10
Chicago, Rock Island & Pacific R. R. Co. v. *McGlinn*, 114 U. S. 542	10
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282	15
Dickenson v. *Stiles*, 246 U. S. 631	15
Hamburg-American Steamship Co. v. *Grube*, 196 U. S. 407	10, 15
Home Insurance Co. v. *Dick*, 281 U. S. 397	15
McCulloch v. *Maryland*, 4 Wheat. 316	11
Murray v. *Joe Gerrick & Co.*, 291 U. S. 315	12, 13
Near v. *State of Minnesota*, 283 U. S. 697	15
Oklahoma City v. *Sanders*, 94 F. (2d) 323	12

Page

People ex rel. Levering v. *Leo*, 112 N. Y. Misc. R. 325 11

Sadrakula, etc., v. *James Stewart & Co., Inc.*, 254 N. Y. App. Div. 892, 279 N. Y. 686, 280 N. Y. 157, 280 N. Y. 236 8, 9, 10

United States National Bank v. *Pamp*, 77 F. (2d) 9 12

Vilas v. *City of Manila*, 220 U. S. 345 11

Ward v. *Krinsky*, 259 U. S. 503 15

Western Union Telegraph Co. v. *Chiles*, 214 U. S. 274 10

STATUTES CITED.

Act of February 13, 1925, Chapter 229, Section 1; 43 Stat. 936, 937 (U. S. Code, Title 28, Section 344), amending Section 237 of the Judicial Code 1

Act of January 31, 1928, Chapter 14, 45 Stat. 54, as amended by the Act of April 26, 1928, Chapter 440; 45 Stat. 466 (28 U. S. C. A., 861a and 861b) 2

Act of February 1, 1928, 45 Stat. 54 (16 U. S. C. A., 457) 12, 13

Baldwin's Code of Ordinances of the City of New York, Chap. 5, Secs. 10 and 190 11

Congressional Record, Vol. 69, Part 2, pp. 678, 1293, 1486 13

Consolidated Laws of New York, Chapter 13, Section 130 4

Constitution of the United States, Article 1, Section 8, Clause 7 11

Labor Law of New York, Section 241, subdivision 4 (Laws of 1921, Chapter 50, Section 241, as amended by Laws of 1922, Chapter 1 and Laws of 1930, Chap. 603; McKinney's Consolidated Laws of New York, Book 30, Section 241 3, 11

New York Civil Practice Act, Section 588 (1) 9

Section 588 (5) 9

Penal Law of New York, Sec. 1275; Consolidated Laws of New York, Chapter 40, Sec. 1275) 11

United States Code, Title 40, Sections 285, 341 and 342 (30 Stat. 614, 44 Stat. 630, 631) 6, 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 251

JAMES STEWART & CO., INC.,

Appellant,

vs.

KATHERINE SADRAKULA, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF NICHOLAS SADRAKULA, DECEASED.

STATEMENT AS TO JURISDICTION ON APPEAL.

May it Please the Court:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1; 43 Stat. 936, 937 (U. S. Code, Title 28, Section 344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

"(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit

could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, * * *, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Act of January 31, 1928, Chapter 14; 45 Stat. 54, as amended by Act of April 26, 1928, Chapter 440; 45 Stat. 466 (28 U. S. C. A. Sections 861-A and 861-B), provides:

"That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Section 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

Date of Judgment and Date of Application for Appeal.

The judgment of the Supreme Court of New York sought to be reviewed was entered on the 13th day of April, 1939, and the application for appeal is presented this 22nd day of June, 1939.

C.

Statute of the State of New York, the Validity of Which is Involved.

The statute, the validity of which is involved, is Section 241, subdivision 4 of an act, known as the Labor Law, which

constitutes Chapter 31 of the Consolidated Laws of New York (Laws of 1921, Chapter 50, Section 241, as amended by Laws of 1922, Chapter 1, and Laws of 1930, Chapter 603; McKinney's Consolidated Laws of New York, Book 30, Section 241).

Said statute, as it was in effect on and after April 19, 1930, read:

"SEC. 241. PROTECTION OF EMPLOYEES ON BUILDING CONSTRUCTION OR DEMOLITION WORK, INCLUDING EXCAVATION WORK IN CONNECTION THEREWITH. All contractors and owners, when constructing or demolishing buildings shall comply with the following requirements:

1. If the floors are to be arched between the beams thereof, or if the floors or filling in between the floors are of fireproof material, the flooring or filling in shall be completed as the building progresses.

2. If the floors are not to be filled in between the beams with brick or other fireproof material, the underflooring shall be laid on each story as the building progresses.

3. If double floors are not to be used, the floor two stories immediately below the story where the work is being performed shall be kept planked over.

4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces seasonably required for proper construction of the iron or steel work, for raising or lowering of material or for stairways and elevator shafts designated by the plans and specifications.

5. If elevators, elevating machines or hod-hoisting apparatus are used in the course of construction, for the purpose of lifting materials, the shafts or openings in each floor shall be inclosed or fenced in on all sides by a barrier of suitable height, except on two sides which may be used for taking off and putting on materials, and those sides shall be guarded by an adjustable barrier not less than three nor more than four feet from

the floor and not less than two feet from the edges of such shafts or openings.

6. If a building in course of construction is five stories or more high, no lumber or timber for such construction shall be hoisted or lifted on the outside of such building."

D.

Nature of Case.

(Herein the appellant will be referred to as "defendant" and appellee's intestate as "plaintiff".)

This is a civil action wherein appellee sued defendant, under the New York equivalent of Lord Campbell's Act (Consolidated Laws of New York, Chapter 13, Section 130) to recover damages for the death of plaintiff.

The accident occurred on October 24, 1935, in the Post Office and Federal Office Building in New York City which defendant, as general contractor, was erecting pursuant to a contract with the Treasury Department of the United States, Procurement Division (R.[1] 5, 18, 110, Defendant's Exhibit A for Identification, R. 121; excluded, R. 111), on land which the United States had purchased for that purpose in 1931, with the consent of the New York Legislature (R. 17, 18).

Plaintiff was employed as foreman rigger by United Hoisting Co. and was in charge of installing certain concrete mixing and conveying equipment, including a bucket hoist, which his employer had contracted to furnish and install for defendant's use during the construction of the building (R. 5, 24, 25; Plaintiff's Exhibit 3, R. 118, admitted, R. 34).

The installation thereof was begun the day before the accident (R. 27). At that time, the erection of the structural steel for that section of the building had been completed

[1] All references are to pages of the printed Case on Appeal in the Court of Appeals, which will be included in the certified record prepared by the Clerk of the Supreme Court of the State of New York, Kings County, and filed with the Clerk of this Court.

(R. 113, 114) but no floors had been "filled in", except at the first tier of steel (the one from which plaintiff fell). There, the floor "forms" had been placed and concrete poured in all but the two adjacent "bays", in which the hoisting equipment was to be placed (R. 43, 61, 67). Admittedly, those "bays" were not "planked over" but the hoist could only be installed in "open steel" (R. 39).

While standing on a plank which was lying across one of those "bays", to measure one of the two vertical "guide-rails" which he had erected to carry the bucket-hoist, plaintiff fell to the ground beneath, receiving the injuries from which he died (R. 61, 62, 65, 79, 85).

The shaftway for the hoist occupied only a small part of the "bay" and its location therein, which depended upon the precise position of other parts of the equipment, had been determined by plaintiff, as a part of his work (R. 38, 40, 45, 46).

Appellee charged defendant with liability for plaintiff's death solely upon the ground that the New York Labor Law, Section 241 (4), required it to keep the beams, at the place where plaintiff fell, "thoroughly planked over" and that his death was caused by defendant's failure to do so (R. 112, folio 336). All other specifications of negligence were expressly withdrawn (R. 96, 97, 98, 110, 112).

In support of its defense that the Labor Law did not apply to the construction of that building, defendant offered in evidence (R. 110, 111) its contract with the United States, dated November 9, 1934, particularly the stipulations therein relative to the applicability of State and municipal building regulations to the work therein provided for (Defendant's Exhibit A for Identification, R. 121). It was there provided that municipal ordinances "do not apply inside of the lot lines" and that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines" (R. 121, folios 362, 363). This was ex-

cluded on appellee's objection that it was "not binding in this matter" to which ruling defendant duly excepted (R. 110, 111).

At the conclusion of the evidence, defendant moved for the direction of a verdict in its favor "on the specific ground" that the Labor Law "is not applicable to the place of the accident and that application thereof to the place of the accident is in violation of Article 1, Section 8 of the United States Constitution" and duly excepted to the denial thereof (R. 112, 113, folios 336-337). The jury was then waived by consent of the parties and the case was submitted to the Court for decision (R. 113). The Court found, as a fact, that "the proximate cause of the accident which occasioned decedent's death was the failure of the defendant to thoroughly plank over the beams as required by Section 241, subdivision 4, of the Labor Law" and directed judgment in favor of the appellee (Memorandum Decision of Hon. Harry E. Lewis, Justice, appended hereto; R. 122), upon which judgment was duly entered in the office of the Clerk of the Supreme Court, Kings County, on November 24, 1937 (R. 15).

Defendant duly appealed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from that judgment and, upon that appeal, in its brief and argument (no assignment of errors being provided for in New York practice) contended that, as applied and enforced in this case, the New York Labor Law, Section 241, subdivision 4, was repugnant to Article 1, Section 8 of the Constitution of the United States and to the Provisions of U. S. Code, Title 40, Sections 285, 341 and 342 (30 Stat. 614; 44 Stat. 630, 631) and that the denial of its motion for the direction of a verdict in its favor was, therefore, reversible error. Nevertheless, said Appellate Division unanimously sustained the validity of that application of said statute and affirmed said judgment (R. 127, 128.

129), holding that the statute, having been in effect "before the act of cession" and there having been "no action by Congress displacing * * * (it) in respect of this Federal reservation", it continued to apply therein (R. 131; Memorandum Decision of Appellate Division, Second Department, appended hereto; R. 131; officially reported, Sadrakula, as admx., etc. *v.* James Stewart & Co., Inc., 254 N. Y. App. Div. 892).

Defendant then applied to the Court of Appeals, under New York Civil Practice Act, Section 588 (5), for permission to appeal from said judgment of affirmance and, also, appealed to said court, as of right, under New York Civil Practice Act, Section 588 (1), upon the ground that said judgment was "entered upon" a decision "which finally determines an action * * * wherein is directly involved the construction of the Constitution * * * of the United States, * * *." The Court of Appeals denied defendant's motion for *permission* to appeal "on the ground that an appeal has been properly[2] taken *as of right*" (R. 130; officially reported, 279 N. Y. 686).

In its brief and upon the argument of that appeal in the Court of Appeals, defendant claimed that said Labor Law, when applied to the place where plaintiff sustained his injury, was invalid, in that it was repugnant to Article 1, Section 8 of the Constitution of the United States and contrary to the express stipulations of defendant's contract with the United States (Defendants Exhibit A for Identification, R. 121; excluded, R. 111), made pursuant to United States Code, Title 40, Sections 285, 341, 342 (30 Stat. 614; 44 Stat. 630, 631). The Court of Appeals unanimously, without opinion, affirmed the said judgment against defendant and decided in favor of the validity of said Labor Law when so applied. (Officially reported, *Sadrakula, as admx. etc.*, v. *James Stewart & Co., Inc.*, 280 N. Y. (Adv. #1) 157 Mem.)

[2] All emphasis contained in quotations herein is ours.

On defendant's application, the Court of Appeals thereafter amended its Remittitur by adding thereto the following (Officially reported, *Sadrakula* v. *Stewart*, 280 N. Y. (Adv. #2) 236 Mem.):

> "A question under the Federal Constitution was presented and necessarily passed upon by this Court. The appellant contended that Section 241, sub-division 4 of the Labor Law of the State of New York (Consolidated Laws of New York, Chapter 31, Section 241, sub-division 4) insofar as the said law is construed to apply to the construction and erection of a post office building pursuant to a contract with the Treasury Department of the United States, upon land within the exterior boundaries of the State of New York but which is within the exclusive jurisdiction of the United States under Article 1, Section 8, Clause 17 of the Constitution of the United States, is repugnant to the Constitution and laws of the United States in that it offends Article 1, Section 8 of the Constitution of the United States and Title 40 U. S. Code, Sections 285, 341 and 342 (30 U. S. Stat. 614; 44 U. S. Stat. 630, 631) and is invalid when so applied.
>
> This Court held that the aforesaid Labor Law of the State of New York is valid and not repugnant to any provision of the Constitution of the United States."

No opinions were written in any of the State courts, except the memorandum decisions of the Supreme Court, Kings County (Hon. Harry E. Lewis, Justice), and of the Appellate Division, Second Department, both of which are appended hereto (pp. 16-17, post).

E.

State of proceedings at which, and manner in which, the Federal questions sought to be reviewed, were raised in the Court of First Instance and in the Appellate Courts and the way in which they were passed upon in those courts.

The Federal questions sought to be reviewed were raised in the court of first instance by defendant's motion to dis-

miss the complaint, at the close of plaintiff's case (R. 98, 99, folios 294, 295, 297) which was renewed at the close of the entire case (R. 112, folios 334, 335); and by its motion for the direction of a verdict in its favor (R. 112, 113, folios 336, 337). Those motions were denied by that Court, to which rulings defendant (appellant) duly excepted (R. 99, folio 297; R. 112, folio 335; R. 113, folio 337).

In the Appellate courts they were raised by appellant's appeal from the final judgment against it, and urged in the briefs and oral arguments. The Appellate Division, Second Department, passed upon those questions in its Memorandum Decision (R. 131; Officially reported, *Sadrakula, etc.* v. *James Stewart & Co., Inc.*, 254 N. Y. App. Div. 892) and affirmed the judgment of the Supreme Court, Kings County (R. 127, 128) and the Court of Appeals affirmed the said judgment of affirmance of said Appellate Division, Second Department (Officially reported, *Sadrakula, etc.* v. *James Stewart & Co., Inc.*, 280 N. Y. (Adv. #1) 157 mem.).

That those questions had been properly raised and necessarily decided was determined by the Court of Appeals upon its denial of appellant's motion for leave to appeal to that court, under New York Civil Practice Act, Section 588 (5). Said court then held that appellant's appeal, *as of right*, under Civil Practice Act, Section 588 (1), was properly taken. Under that statute, an appeal to the Court of Appeals from a judgment of affirmance by the Appellate Division, entered upon a *unanimous* decision, is allowed, as of right, *only* when such judgment is entered upon a decision, finally determining an action, "wherein is *directly* involved the construction of the constitution of the state or of the United States * * *."

F.

Grounds Upon Which it is Contended that the Questions Involved Are Substantial.

The precise question presented in the instant case is whether the State Labor Law which was in effect when jurisdiction of the enclave was ceded to the United States, continued in effect thereafter, so as to render it applicable to a post office, under construction therein for the United States, pursuant to a contract in which the sovereign specified that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines" (Defendant's Exhibit A for Identification, R. 121; excluded, R. 110, 111).

The decisions of the State courts do not rest upon the ground that exclusive jurisdiction of the enclave had not, in fact, been ceded before the accident and before the execution of appellant's contract with the United States, but are placed entirely upon the ground that the State statute continued to apply *after* such cession, because the Congress had not "displaced" it (Decision of Appellate Division, appended hereto; R. 131; Officially reported, *Sadrakula, as admx. etc.*, v. *James Stewart & Co., Inc.*, 254 N. Y. App. Div. 892).

That laws, termed "municipal", which regulate the rights of the inhabitants of such enclave in their relations with one another, continue in force after such cession, on the theory that they have been *adopted* by the new sovereign, has been decided by this Court.

Chicago, Rock Island & Pacific R. R. Co. v. *McGlinn*, 114 U. S. 542, 546;

Barrett v. *Palmer*, 162 U. S. 399;

Hamburg-American Steamship Co. v. *Grube*, 196 U. S. 407;

Western Union Telegraph Co. v. *Chiles*, 214 U. S. 274;

Vilas v. *City of Manila*, 220 U. S. 345;
Arlington Hotel Co. v. *Fant*, 278 U, S. 439.

The statute involved herein is not a law of that character. It regulates the manner and order in which certain parts of the work must be done in the construction of buildings and renders failure to comply with those requirements a criminal offense (Penal Law, Sec. 1275; Consolidated Laws of New York, Chapter 40, Sec. 1275). In New York City its enforcement is entrusted to the Superintendent of Buildings of that city, who is also charged with the enforcement of the Building Code of the City of New York. That official is authorized to enter upon any premises wherein such work is being performed and is empowered, if he deems it necessary, to order the cessation of all work pending compliance with its requirement. Labor Law, Sec. 242; Baldwin's Code of Ordinances of the City of New York, Chap. 5; Secs. 10 and 190; *People Ex rel. Levering* v. *Leo*, 112 N. Y. Misc. R. 325.

As applied in the instant case, that statute operated to impose a burden upon the work which appellant was performing for the United States.

The establishment and conduct of the post office system and the construction of buildings therefor is an exclusive function of the Federal Government. Constitution of the United States, Art. 1, Sec. 8, Clause 7. The construction of the building in the instant case was therefore an exclusive function of the Federal Government, and the State and its officers were powerless to compel compliance with that State statute, not merely because it was beyond their territorial jurisdiction, but because enforcement thereof would constitute an interference with the exercise by the Federal Government of its functions.

Arizona v. *California*, 283 U. S. 423, 451;
McCulloch v. *Maryland*, 4 Wheat. 316, 436;

Oklahoma City v. *Sanders* (C. C. A.), 94 F. (2d) 323;

United States National Bank v. *Pamp* (C. C. A.), 77 F. (2d) 9, 12.

The argument that imposition of civil liability upon appellant did not interfere with the performance of this Federal function begs the question. *Compliance* with the requirements of the statute imposed a direct burden thereon and civil liability results solely from non-compliance.

That the United States could adopt those requirements as its own may not be questioned. It is, however, equally clear that *it alone* had the right to determine the advisability of doing so. The ultimate question then is: Did it intend to do so?

Its only expression on that subject is found in its contract with appellant wherein it is expressly provided that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines" (Defendant's Exhibit A for Identification, R. 121; excluded, R. 111).

The decision of the State courts in the instant case presents the incongruous situation that a state statute is effective to impose civil liability for non-compliance with its terms but ineffective to compel compliance therewith. (Cf. *Murray* v. *Joe Gerrick & Co.*, 291 U. S. 315, 319).

The question here presented has never been determined by this Court. In fact, we know of no case in which the applicability of a statute of this character to work being done for the Federal Government, in territory within its exclusive jurisdiction, has been considered, except *Oklahoma City* v. *Sanders*, *supra* (94 F. (2d) 323). In that case, however, the question of civil liability for non-compliance was not presented.

Whether Act of February 1, 1928, 45 Stat. 54 (16 U. S. C. A. Sec. 457), renders the State Labor Law applicable in

the instant case, is also involved. That statute reads in part:

> "*Action for death or personal injury within national park or other place under jurisdiction of United States; application of state law.** In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any state, such right of action shall exist as though the place were under the jurisdiction of the state within whose exterior boundaries such place may be; * * *." (* Italicized in original.)

The only case in which the construction of that Act has been before this Court is, *Murray* v. *Joe Gerrick & Co., supra* (291 U. S. 315), in which it was held that the Washington Workmen's Compensation Act was not thereby rendered effective in Federal territory. True, that State law was enacted *after* the cession of jurisdiction to the United States. However, no distinction is made by the statute itself upon that ground. The decision in that case seems to have been based principally upon the ground that the remedy granted by the State statute and which it was sought to enforce therein was not a "right of action", within the meaning thereof. It was said that the purpose of that Act was to prevent the abatement of causes action for injuries resulting in death, accruing in Federal territory. That this was, in fact, its purpose was stated by its sponsor, the late Senator Walsh of Montana, in explaining it in the Senate (Congressional Record, Vol. 69, Part 2, pp. 678, 1293, 1486).

Since the enactment of Act of February 1, 1928, 45 Stat. 54 (16 U. S. C. A., Sec. 457), several bills have been introduced in Congress which were intended to require compliance with State safety laws on Federal projects, but all failed of enactment. The latest of which we are aware was introduced in the first session of the 75th Congress by

Senator Sheppard (S. 1744; Congressional Record, Vol. 81, No. 42, p. 2159). It read:

> "Be it enacted," etc., "That all agencies of the Federal Government undertaking construction of public buildings and other public works under Federal law shall observe, and shall require all employees and contractors to observe the various State safety laws, as well as safety laws and regulations of the Federal Government."

It would seem therefore that Congress not only did not construe the Act of February 1, 1928, as adopting such State laws for the regulation of Federal projects, but that it was unwilling to do so.

It is appellant's contention that the Federal questions presented in the instant case are substantial for the reason that they have never been directly decided by this Court; that a final and definite determination thereof is of the greatest importance, not only to appellant, but to all others contracting with the United States for similar work, and that the decision of the State courts in the instant case is contrary to the intent of the United States as expressed in its contract with appellant.

There is appended hereto copies of the opinions of the Supreme Court of the State of New York, Kings County, and of the Appellate Division of the Supreme Court, Second Judicial Department, delivered in rendering their respective judgments herein. No opinion was delivered by the Court of Appeals in rendering the judgment sought to be reviewed.

G.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Hamburg-American Steamship Co. v. *Grube*, 196 U. S. 407, 414;
Dickenson v. *Stiles*, 246 U. S. 631, 632;
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 288, 289;
Ward v. *Krinsky*, 259 U. S. 503, 507, 510;
Home Insurance Co. v. *Dick*, 281 U. S. 397, 406, 407;
Near v. *State of Minnesota*, 283 U. S. 697, 709, 722, 723.

Respectfully submitted,

CLARENCE E. MELLEN,
FREDERICK MELLOR,
Attorneys for Appellant.

EXHIBIT "A".

Decision of Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

Supreme Court, Appellate Division, Second Department.

KATHERINE SADRAKULA, as Administratrix, etc., of Nicholas Sadrakula, *Respondent*,

vs.

JAMES STEWART & CO., INC., *Appellant*.

Present: Lazansky, P. J., Hagarty, Carswell, Davis and Taylor, Jr., JJ.

Action for damages for the death of plaintiff's decedent as a consequence of a violation by the defendant of Section 241, subdivision 4, Labor Law, in the course of the erection of a Federal post office building.

Judgment for plaintiff unanimously affirmed, with costs. (a) The evidence adequately established that the proximate cause of the decedent's death was defendant's failure to plank over the steel beams in the western area of the "bay" as required by Section 241, subdivision 4, Labor Law. (b) The Labor Law provision was in effect at the place of the accident because that statute was enacted prior to the acquisition of the property by the Federal Government. The common law and statutes in effect before the act of cession remain in force until displaced by Congress (Kaufman *v.* Hopper, 220 N. Y. 184, 187, 115 N. E. 470, and cases cited therein). There has been no action by Congress displacing the Labor Law in respect of this Federal reservation. Such Federal action as has taken place is confirmatory of plaintiff's right to invoke the applicable State statutes (45 Stat. 54, tit. 16, U. S. Code, sec. 457).

CORRECTED OPINION BY LEWIS, J., DATED NOVEMBER 30, 1937.

Supreme Court, Trial Term—Part VIII.

By Mr. JUSTICE LEWIS.

Sadrakula, as adm'x, &c., *v.* James Stewart & Co., Inc., and ano. (corrected)—Action by the plaintiff against the general contractor, James Stewart & Co., Inc., for damages resulting from the death of her husband, an employee of a subcontractor. The proximate cause of the accident which occasioned decedent's death was the failure of the defendant to thoroughly plank over the beams as required by section 241, subdivision 4, of the Labor Law. The defense of assumption of risk is not maintainable where, as here, the relationship of master and servant did not exist. There was likewise a failure to establish that plaintiff's decedent was guilty of any contributory negligence. I direct judgment in favor of the plaintiff for the sum of $23,125.

LEWIS, *J. S. C.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 251.

JAMES STEWART & CO., INC.,

Appellant,

against

KATHERINE SADRAKULA, as administratrix of the goods, chattels and credits which were of NICHOLAS SADRAKULA, deceased,

Appellee.

Appeal from the Supreme Court of the State of New York.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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INDEX

INDEX AND LIST OF AUTHORITIES

PAGE

Statement 1

I. Appellant's contention that the New York Labor Law is repugnant to Section 8, Article I of the Constitution of the United States, when applied, as it was by the Court below, to the construction of a Federal public building, upon land within exclusive Federal jurisdiction, necessarily involves the determination of Federal questions. 2

II. The Federal questions involved are substantial.... 6

A. As to territorial jurisdiction..... 6

B. As to the applicability of the Labor Law in Federal territory..... 11

a. Did the United States impliedly adopt it?..... 12

b. Did the Act of Congress of February 1, 1928 (16 U. S. C. A., Sec. 457) expressly adopt it..... 14

APPENDIX

1. New York Labor Law, Section 241 (Consolidated Laws of New York, Chap. 31, Sec. 241)..... 17

2. Article I, Section 8, clauses 1, 7, 17 and 18 of the Constitution of the United States..... 18

3. Decedent Estate Law, Section 130 (Consolidated Laws of New York, Chap. 13, Sec. 130)..... 18

4. Decision of the Trial Court (Lewis, J.)..... 19

5. Decision of Appellate Division, Second Department 19

PAGE

6. Act of Congress of February 1, 1928 (Title 16, U. S. C. A., Sec. 245; 45 Stat. 54) 20

7. General Municipal Law, Article 11, Sections 210, 211, 212 (Consolidated Laws of New York, Chap. 24, Secs. 210, 211, 212; L. 1909, Chap. 29, Secs. 210, 211, 212) 21

8. State Law, Article 4, Sections 50 to 57, inclusive (Consolidated Laws of New York, Chap. 57, Secs. 50 to 57, inclusive; L. 1909, Chap. 59, Secs. 50 to 57, inclusive) 22

9. State Law, Section 37 (Consolidated Laws of New York, Chap. 57, Sec. 37) 24

10. United States Code, Title 40, Section 255 24

11. Excerpt from Contract between Appellant and the Treasury Department of the United States (Defendant's Exhibit A for Identification; excluded R. 111, printed R. 124) 24

TABLE OF CASES AND AUTHORITIES

CASES

	PAGE
Amberg v. Kinley, 214 N. Y. 531	4
American Ins. Co. v. Canter, 1 Pet. (26 U. S.) 511, 541	11
Arizona v. California, 283 U. S. 423	13
Atkinson v. State Tax Comm., 303 U. S. 20	9
Benson v. United States, 146 U. S. 325, 330, 331	8
Berla v. Zambetti, 235 N. Y. App. Div. 464	4
Bowen v. Johnston, 306 U. S. —, 83 L. Ed. (Adv.) 421, 428	13
California Water Serv. Co. v. Redding, 304 U. S. 252	6
Caminiti v. Matthews Const. Co., 241 N. Y. App. Div. 879	5
Chicago, R. I. & Pac. R. Co. v. McGlinn, 114 U. S. 542	11
Collins v. Yosemite Park & Curry Co., 304 U. S. 518	9
De Haen v. Rockwood Sprinkler Co., 258 N. Y. 350	4
Drummond v. Norton Co., 156 N. Y. App. Div. 126; aff'd (no opinion) 213 N. Y. 670	12
Educational Films Corp. v. Ward, 282 U. S. 379, 388, 389	13, 14
Farley v. Scherno, 208 N. Y. 269	8
Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525	8
Guglielmo v. Church Eng. Co., 258 N. Y. 566, mem.	4
Honeyman v. Hanan, 300 U. S. 14	11
In re Ladd, 74 Fed. 31, 38	12
James v. Dravo Contracting Co., 302 U. S. 134	8, 9, 13, 14
Lotocka v. Elevator Supplies Co., 246 N. Y. 295	4
Lyles v. Terry & Tench, 227 N. Y. 361	12

PAGE

McNamara v. Eastman Kodak Co., 220 N. Y. 180..... 4
Murray v. Joe. Gerrick & Co., 291 U. S. 315..... 14

Oklahoma City v. Sanders, 19 F. Supp. 50; aff'd 94 F. (2d) 323..... 13

People ex rel. Levering v. Leo, 112 N. Y. Misc. R. 325.. 13
People v. Hillman, 246 N. Y. 467..... 8
Racine v. Morris, 201 N. Y. 240..... 4

Sadrakula v. James Stewart & Co., 254 N. Y. App. Div. 892 (Appendix)..... 3
Sadrakula v. James Stewart & Co., 280 N. Y. (Adv. #1) 137 (no opinion)..... 3
Schmidt v. Merchants Disp. Trans. Co., 270 N. Y. 287.. 4, 5
Silas Mason Co. v. Tax Comm. of Washington, 302 U. S. 186..... 4, 8, 9
Steele v. Halligan, 229 Fed. 1041..... 12
Surplus Trading Co. v. Cook, 281 U. S. 647..... 8

United States v. Unzeuta, 281 U. S. 138..... 8, 11
United States v. San Francisco Bridge Co., 88 Fed. 891. 13

Vollstedt v. Mollar, Inc., 238 N. Y. App. Div. 705, 707.. 5
Western Union Tel. Co. v. Chiles, 214 U. S. 274..... 11
Willy v. Mulledy, 78 N. Y. 310..... 4

Zucht v. King, 260 U. S. 174..... 6

STATUTES

PAGE

Constitution of United States, Art. I, Sec. 8 (Appendix) 8, 18
16 U. S. C. A., Sec. 457 (Appendix) 5, 20
40 U. S. C. A., Sec. 255 (Appendix) 9, 24
Decedent Estate Law of New York, Sec. 130 (Appendix) 2, 18
General Municipal Law of New York, Secs. 210, 211, 212 (Appendix) 6, 7, 10, 21
Labor Law of New York, Sec. 241 (Appendix) 2, 13, 17

New York Session Laws:

Laws 1892, Chap. 678, Sec. 37 7
Laws 1896, Chap. 391 ..... 7, 10
Laws 1899, Chap. 242 ..... 7, 10
Laws 1907, Chap. 375, Sec. 1 7
Laws 1910, Chap. 109, Sec. 1 7
Laws 1911, Chap. 527, Sec. 1 7
Laws 1917, Chap. 819, Sec. 1 7
Laws 1922, Chap. 415 7
Resolution of Congress, September 11, 1841 (5 Stat. at L. 468) 10
Penal Law (New York), Sec. 1275 13
State Law of New York, Secs. 50-57, inclusive (Appendix) 6, 7, 8, 10, 11, 22
State Law of New York, Sec. 37 (Appendix) 7, 21

OTHER AUTHORITIES

Congressional Record, Vol. 69, Part 2, p. 1486 15
Halleck, International Law, Vol. 2, Chap. 34, Sec. 14 .. 11
9 Opin. Attorneys General 10

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 251.

JAMES STEWART & CO., INC.,
Appellant,
against
KATHERINE SADRAKULA, as administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Statement.

The motion to dismiss or affirm is predicated upon the alternative claims that the judgment below did not necessarily rest upon the determination of any Federal question, or, if it did, that the question involved is not substantial.

We will confine ourselves to answering the arguments advanced in support of those contentions.

NOTE: All references to the record are to the pages of the printed case on appeal in the Court of Appeals, included in the certified transcript of the record on file with the Clerk of this Court.

All italics herein are supplied.

I.

Appellant's contention that the New York Labor Law[1] is repugnant to Section 8, Article 1 of the Constitution of the United States,[2] when applied, as it was by the Court below, to the construction of a Federal public building, upon land within exclusive Federal jurisdiction, necessarily involves the determination of Federal questions.

As appears from appellee's "Preliminary Statement," the facts pertinent to the present question are not in dispute.

Pursuant to a contract with the Treasury Department, dated November 9, 1934 (R. 110), appellant, as general contractor, was engaged in erecting a post office building on a tract of land in New York City, which had been purchased by the Federal Government in 1931 for that purpose, with the consent of the State Legislature (R. 17, 18). Appellee's decedent, an employee of a sub-contractor, while working therein on October 24, 1935, fell from the basement to the sub-basement, receiving injuries from which he died (R. 18).

In this action, which was brought under the New York "death statute"[3] (Decedent's Estate Law, Sec. 130; Consolidated Laws of New York, Chap. 13, Sec. 130), to recover damages for his death, the *pleadings* charged appellant with liability upon the ground that his death was caused by appellant's "negligence" in failing to perform various duties which, it was alleged, were imposed upon it, for his benefit, by the common law and by certain State statutes and municipal ordinances (R. 6, 13). Upon the trial, however, all claims of the violation of any duties imposed by the common law, or by municipal ordinances, or any State statute, other than paragraph 1 of Section 241 of the New York Labor Law,[4] were *expressly withdrawn* (R. 96, 97, 98, 110, 112)

[1] Appendix, p. 17.
[2] Appendix, p. 18.
[3] Appendix, p. 18.
[4] Appendix, p. 17.

and appellant was charged with liability *solely* upon the ground that, in the construction of that building, the statute imposed upon it, as general contractor, the duty of keeping the tiers of structural steel "thoroughly planked over" for decedent's protection.

Appellant contended that that statute, which was an exercise of the State police powers, could not be validly applied to the construction of that building, under Article 1, Section 8 of the Federal Constitution, for the reason that the construction thereof was an activity of the Federal Government, conducted in the exercise of its sovereign powers, upon land within its exclusive jurisdiction (R. 98, 99, 112, 113).

That this question was properly raised is not questioned by appellee, but it is claimed that under the applicable State statutes the United States did not acquire *territorial* jurisdiction until after the accident and that, therefore, no Federal question is involved.

No claim is made that the decision of the Court below rested upon that ground, nor is there anything in the record to indicate that it did. In the discussion of appellant's motions to dismiss and for a directed verdict at the trial, that question was not raised (R. 98, 99, 100, 101, 102, 112, 113) and, in its decision, the Trial Court gave no intimation of the reason for its decision on that question. (R.[1] 122). The Appellate Division, however, in affirming the judgment of the Trial Court, did so upon the specific ground that the State statute continued in effect in "this Federal reservation" because it had been enacted before cession of jurisdiction and had not been "displaced by Congress" (R.[2] 131; 254 N. Y. App. Div. 892). As the affirmance by the Court of Appeals was without opinion (280 N. Y. [Adv. #1] 157, mem.), the inference, if any, is that it adopted the view of the Appellate Division. Clearly, therefore, the record does not suggest that the judgment below was predicated upon the ground now urged by appellee.

However, even if the decision of the Court of Appeals had been *placed* upon that ground, this Court would not thereby

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[1] Appendix, p. 19.
[2] Appendix, p. 20.

have been deprived of jurisdiction, because that question, being one regarding the extent of the jurisdiction of the United States, is, in itself, a Federal one, reviewable by this Court.

Silas Mason Co. v. *Tax Comm. of Washington*, 302 U. S. 186, 197, and cases there cited.

It is also said that the Labor Law does not "create a cause of action," but is merely, in effect, a rule of evidence by which a standard for determining the care required by the common law is prescribed.

That assertion is contrary to the settled law of New York, where it has been uniformly held that violation of a statute, which imposes a positive duty for the benefit of a particular class, creates a cause of action in favor of any member of that class who is injured through its violation, regardless of "negligence." The *duty* is created by the statute, regardless of the existence of *any* duty at common law.

Willy v. *Mulledy*, 78 N. Y. 310, 314;
Racine v. *Morris*, 201 N. Y. 240, 244;
Ambery v. *Kinley*, 214 N. Y. 531, 534, 535;
McNamara v. *Eastman Kodak Co.*, 220 N. Y. 180, 182, 183;
Lotocka v. *Elevator Supplies Co.*, 246 N. Y. 295, 296;
De Haen v. *Rockwood Sprinkler Co.*, 258 N. Y. 350, 353, 354, 355;
Schmidt v. *Merchants Dispatch Trans. Co.*, 270 N. Y. 287, 303, 304, 305, 306.

The Labor Law is such a statute. It imposes absolute, non-delegable duties upon those in control of the construction of buildings, for the protection of all persons engaged in the work. Civil liability for injuries or death, resulting from breach thereof, follows by operation of law.

Berla v. *Zambetti*, 235 N. Y. App. Div. 464, 465;
Guglielmo v. *Church Eng'g Co.*, 258 N. Y. 566, mem.;

Vollstedt v. *Mollar, Inc.*, 238 N. Y. App. Div. 705, 707;

Caminiti v. *Matthews Construction Co.*, 241 N. Y. App. Div. 879.

Under New York practice such "cause of action" may be asserted under general allegations of "negligence" and may be relied upon although not "separately stated."

Schmidt v. *Merchants Dispatch Trans. Co.*, 270 N. Y. at pp. 298, 299, 303, 304, 305, 306.

Appellee's pleadings were in that form, but, at the trial, all charges of "common law" negligence were specifically withdrawn and the case was submitted solely under the statute (R. 112).

Clearly, therefore, the judgment appealed from rests upon a decision sustaining the validity of that State statute against appellant's contention that its application herein is repugnant to the Federal Constitution. That decision necessarily involved the determination of three Federal questions:

a. Whether the place where the alleged statutory violation occurred was within the exclusive territorial jurisdiction of the United States;

b. If so, whether that State statute "continued in effect" therein so as to be effective to control the manner in which appellant was required to perform its contract with the United States;

c. Whether the Act of Congress of February 1, 1928, Chapter 15 (U. S. Code, Title 16, Sec. 457[1]), may properly be construed as *expressly* adopting for such Federal territory a State statute of that type so as to render it applicable to a Federal activity therein.

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[1] Appendix, p. 20.

II.

The Federal questions involved are substantial.

We understand the rule to be that a Federal question, which is obviously without merit, or clearly unsound under the previous decisions of this Court, is not deemed substantial.

> *Zucht* v. *King*, 260 U. S. 174, 176, 177;
> *California Water Service Co.* v. *Redding*, 304 U. S. 252, 255.

We have been unable, after diligent search, to find any case in which the courts of New York have been called upon to construe the statutes upon which appellee relies in support of her contention regarding territorial jurisdiction; nor are we aware of any decision of this Court in which a State building regulation, similar in import to the New York Labor Law, has been held applicable to the conduct of a Federal project in Federal territory.

A.

As to Territorial Jurisdiction.

Concededly, the land in question, an entire block in New York City, was *purchased* at private sale by the United States in 1931, with the *consent* of the Legislature, for the purpose of erecting a post office thereon (R. 17, 18). It is claimed, however, that *jurisdiction* thereof was not acquired until December, 1935, because certified copies of the title papers were not filed with the Secretary of State of New York until then.

This claim is based upon Section 211 of the General Municipal Law[1] (Consolidated Laws of New York, Chap. 24, Sec. 211; L. 1909, Chap. 29, Sec. 211) and Section 52 of the State Law[2] (Consolidated Laws of New York, Chap. 57, Sec. 52; L. 1909, Chap. 59, Sec. 52).

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[1] Appendix, p. 21.
[2] Appendix, p. 22.

Sections 210, 211 and 212 of the General Municipal Law constitute a separate article thereof and are derived from a single Act (L. 1899, Chap. 242, Secs. 1, 2, 3). The only change was the addition of the words "or village" following "in any city" in the middle of Section 210, and following "in any such city" at the end thereof (L. 1907, Chap. 375, Sec. 1).

By Section 210 its application is limited to the acquisition, in municipalities, of "one or more pieces of land *not exceeding two acres in extent.*" Here, there is no evidence as to the size of the tract involved (R. 18).

The first *general* statute on the subject (L. 1896, Chap. 391) from which Article 4 (Secs. 50-57,[1] inclusive) of the State Law is derived (McKinney's Consolidated Laws, Book 56, Sec. 50 and footnote) granted the general "consent" of the State to the "purchase" by the United States of "*any* tract, piece or parcel of land * * * situate upon or adjacent to the navigable waters thereof," for certain specified purposes, including post offices, and provided that the title papers thereof should be recorded in the office of the appropriate officer of the *county* wherein the land was situated.

By subsequent amendments the words "situate upon or adjacent to the navigable waters thereof" were deleted (L. 1910, Chap. 109, Sec. 1) and further "purposes" added (L. 1911, Chap. 527, Sec. 1; L. 1917, Chap. 819, Sec. 1; L. 1922, Chap. 14). State Law, Section 50, is identical with Section 1 of that Act of 1896 as so amended (L. 1896, Chap. 391; Sec. 1).

Prior to that time all "consents" and "cessions" were by special acts (State Law, Secs. 20 *et seq.*). Obviously, therefore, when that general statute was enacted, it was necessary to provide, not only for property to be *subsequently* acquired, but also for that already owned, but as to which there had been neither consent nor cession. This is borne out by the "saving clause" at the conclusion of Article 3 of the State Law (Sec. 37),[2] in which the previous *special* acts of cession are re-enacted and confirmed, which, in turn, is derived from a previous State Law (L. 1892, Chap. 678, Sec. 37). It is

[1] Appendix, p. 22.
[2] Appendix, p. 24.

there provided that the adoption of the consolidation of those special acts shall not be construed as ceding any territory, or the jurisdiction thereof, "not so ceded" by the special acts thereby repealed.

Although apparently never directly *decided*, judicial opinion, as expressed in this Court and in the Court of Appeals of New York, seems to have been uniform that Clause 17 of Section 8, Article 1 of the Federal Constitution, *proprio vigore*, transfers jurisdiction to the United States in those cases in which it *purchases* land, with the *consent* of the Legislature, for the purposes therein described. On the other hand, as to lands *otherwise* acquired, the United States may acquire jurisdiction only by cession from the State.

> *Ft. Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525, 537, 538, 539;
> *Benson* v. *United States*, 146 U. S. 325, 330, 331;
> *United States* v. *Unzeuta*, 281 U. S. 138, 142;
> *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 652;
> *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 142;
> *Silas Mason Co.* v. *Tax Comm. of Washington*, 302 U. S. 186, 197;
> *Farley* v. *Scherno*, 208 N. Y. 269, 271;
> *People* v. *Hillman*, 246 N. Y. 467, 479.

Viewed in that light, it becomes apparent that Section 56 of the State Law grants the consent contemplated by Clause 17 as to future *purchases*. Section 51 provides a method by which title may be acquired when "purchase" in the usual sense, i. e., by mutual agreement, is impossible. Section 52 then *authorizes* the Governor, "if he deems it proper," to execute formal cessions of jurisdiction, upon the filing, with the Secretary of State, of certified copies "of the record or transfer" of any tracts of land which "have been acquired" for the specified purposes.

It is, we submit, inconceivable that Section 52 was intended to apply to land *purchased*, as to which *consent* had been given by Section 50, as well as to land *otherwise* acquired. To so construe it, gives the Executive *discretionary* authority to nullify the legislative consent. On the other hand,

if construed to apply only to land *otherwise* acquired, the entire act is consistent and carries out the undoubted purpose of providing a uniform method by which the United States *would* acquire jurisdiction in all of the cases contemplated by Clause 17 and *might* acquire like jurisdiction in other cases, if the executive departments of both governments deemed it proper.

Collins v. *Yosemite Park & Curry Co.*, 304 U. S. 518, 528.

It may, however, be argued that Clause 17 does not *require* the Federal Government to accept jurisdiction and that, therefore, Section 50 is a mere tender thereof, which must be accepted in the manner specified in Section 52.

Cf. Atkinson v. *State Tax Commission of Oregon*, 303 U. S. 20, 23.

The right of the United States to reject the jurisdiction conferred upon it by Clause 17 seems to have been suggested for the first time in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 148. It seems highly improbable, therefore, that the New York Legislature had that thought in mind in 1896 when this statute was first enacted.

In the instant case, there is not merely a lack of evidence that the United States intended to decline jurisdiction, from which the intention to accept it is to be presumed (*Silas Mason Co.* v. *Tax Commission*, 302 U. S. at p. 207; *Atkinson* v. *State Tax Commission*, 303 U. S. at p. 23), but it is clear that the Treasury Department believed that jurisdiction had been acquired.

Unlike the *Mason* and *Atkinson* cases, here the land was purchased as the site of a "public building." Therefore, the provisions of U. S. Code, Title 40, Section 255,[1] applies thereto. The expenditure of public money thereon was thereby prohibited "until the consent of the legislature to such purchase" had been given.

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[1] Appendix, p. 24.

In an opinion regarding that statute, which is derived from a Resolution of Congress of September 11, 1841 (5 Stat. at L. 468), the Attorney General of the United States said in part:

> "This does not require the cession of jurisdiction, either exclusive or otherwise. When the Legislature consents to the purchase, the 8th Section of the Constitution provides for exercising exclusive legislation, which is full jurisdiction. * * *. In the Act in question, the 'consent' of the Legislature to the purchase is complete; and having been given, the Constitution carries with it the authority and jurisdiction required by the resolution of 1841."
>
> (9 Opin. Attorneys General, 129, 130.

Here, appellant contracted with the Treasury Department to construct the building on November 9, 1934 (R. 110), more than a year before the papers referred to in State Law, Section 52, were filed.

That contract contained provisions relating to the non-applicability of municipal ordinances and of State and municipal building regulations to work conducted "inside the Government's lot lines" (Defendant's Exhibit A for Iden,[1] R. 121; Assignment of Errors, Item 6), which are, we submit, utterly inconsistent with an intention that the State should retain jurisdiction.

Referring again to the provisions of the General Municipal Law, Section 211, it is noteworthy that it was first enacted (L. 1899, Chap. 242) when the general "consent" (L. 1896, Chap. 391) was limited to lands "situated on or adjacent to" navigable waters. Obviously, such consent was of little practical value as to sites for post offices and office buildings. Hence, this grant thereof for those purposes in cities. Its second section (now General Municipal Law, Sec. 211, without change) is substantially equivalent to Sections 52 and 54 of the State Law, except that the cession of jurisdiction follows from the filing of certified copies of the title papers, without any action by the governor.

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[1] Appendix, p. 24.

We submit that those provisions, if applicable despite their limitation to tracts of not more than two acres, are subject to the same construction which we have urged regarding Sections 50 and 52 of the State Law.

We believe, therefore, that appellant's contention that the locus of the accident was within Federal jurisdiction, presents a question which neither lacks merit, nor is contrary to previous decisions of this Court, but is, on the contrary, a substantial Federal question which this Court should determine, or, if it deems necessary, remand to the State Court for that purpose.

Honeyman v. *Hanan*, 300 U. S. 14, 26.

B.

As to the Applicability of the Labor Law in Federal Territory.

That laws which regulate the personal and property rights of the inhabitants, termed "municipal," continue in effect after change of sovereigns; whereas those termed "political," which regulate, or depend upon the relationship between sovereign and subject, do not survive such change, is not questioned. As to the former, the rule is one of practical convenience and necessity, without which a change of jurisdiction would be productive of, at least temporary, chaos.

American Ins. Co. v. *Canter*, 1 Pet. (26 U. S.) 511, 541;

Chicago, Rock Island & Pacific R. R. Co. v. *McGlinn*, 114 U. S. 542, 546, 547;

Western Union Telegraph Co. v. *Chiles*, 214 U. S. 274, 277, 278;

United States v. *Uzzeuta*, 261 U. S. at p. 142;

Halleck, International Law, Vol. 2, Chap. 34, Sec. 14.

The question is necessarily one of *adoption*. As legislative authority terminates upon loss of jurisdiction, existing laws no longer derive their sanction from the enacting authority. Their effectiveness thereafter must be derived

from the authority of the succeeding sovereign. Hence, the rule regarding "municipal" laws, must rest upon the theory that they were impliedly *adopted* by the new sovereign.

In re Ladd, 74 Fed. 31, 38;
Steele v. *Halligan*, 229 Fed. 1011, 1018.

a. *Did the United States impliedly adopt it?*

Whether a pre-existing law may be *deemed* adopted is necessarily dependent upon the presumed *intent* of the sovereign. Hence, in the last analysis, the present question is whether the Federal Government *intended*, that in the construction of this post office building, its contractor should be required to comply with that State statute.

The statute,[1] as construed by the highest court of the State, specifies the manner in which and the time when, the floors must be installed in buildings of various types of construction, and requires that each tier of steel be thoroughly planked over, immediately upon its completion.

Lyles v. *Terry & Tench Co.*, 227 N. Y. 361, 364, 365;
Drummond v. *Alfred E. Norton Co.*, 156 N. Y. App. Div. 126, aff'd (no opinion) 213 N. Y. 670.

In the instant case the steel work had been *completed* and violation of the statute has been predicated upon failure to have a *part* of the *lowest tier* thereof covered. Inferentially, therefore, it has been held that the statute not only required that each tier be planked over upon its completion, but that it be *kept* so planked until the floors were completely filled in.

Any violation of the statute is a penal offense and, in New York City, the Superintendent of Buildings, who is charged with its enforcement, is empowered to supervise the work and, if he deems life or property endangered by its violation, to compel the cessation of all work.

[1] Appendix, p. 17.

Labor Law, Secs. 2(2), 21(9), 241, 242, 651(1);
Penal Law, Sec. 1275 (Consolidated Laws of New York, Chap. 40, Sec. 1275);
People ex rel. Lærering v. *Leo*, 112 N. Y. Misc. R. 325.

That the State and its officers would be without authority to thus *enforce* that statute in Federal territory seems clear.

James v. *Dravo Contracting Co.*, 302 U. S. 132, 138, 139;
Boiven v. *Johnston*, 306 U. S. , 83 L. Ed. (Adv.) 421, 428;
Oklahoma City v. *Sanders*, 19 F. Supp. 50, 51, 54, 55, 56, aff'd 94 F. (2d) 323, 326, 327, 328, 329.

As *such* enforcement would necessarily interfere with the *work*, it would also seem to be unauthorized, as to a Federal project, in State territory.

Arizona v. *California*, 283 U. S. 423, 451, 452;
Educational Films Corp. v. *Ward*, 282 U. S. 379, 388, 389;
United States v. *San Francisco Bridge Co.*, 88 Fed. 891, 894, 895.

We submit, therefore, that there is no basis for an assumption that the United States intended to adopt the *enforcement* provisions of that statute, at least with respect to the conduct of its own enterprise.

True, the application made of the statute in this case did not result in any interference with the work. It resulted only in the imposition of civil liability upon appellant. Nevertheless, that liability flows from failure to comply with the statute and is, therefore, an indirect method of enforcing it. Whether *such* enforcement would constitute an unlawful "interference" with a Federal activity conducted in *State* territory need not be now determined.

Cf. James v. *Dravo Contracting Co.*, 302 U. S. at pp. 154, 155;

Educational Films Corp. v. *Ward*, 282 U. S. at pp. 388, 389.

The question here presented is: May it be assumed that the Federal Government *intended* to adopt a statute, incapable of direct enforcement, which, if complied with, would operate to control, at least in part, the manner in which *its* work must be performed and, in that respect, *supersede* any contrary provisions of *its contract* therefor?

In the instant case that contract specified that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines."[1] The exclusion from evidence of that part of the contract was apparently on that theory (R. 110, 111).

It seems incredible that the government could have *intended* such result, or that it could have intended to produce the "incongruous situation" of having a law "in part effective and in part ineffective, within the area" under its jurisdiction.

Murray v. *Joe Gerrick & Co.*, 291 U. S. 315, 319.

We submit, therefore, that a substantial question is presented as to whether the Labor Law was impliedly adopted by the Federal Government, as was decided by the Court below.

b. *Did the Act of Congress of February 1, 1928*[2] *(46 U. S. C. A., Sec. 57) expressly adopt it?*

We know of only one case in which the meaning of that Act was considered.

This Court there held that it did not render the Workmen's Compensation Law of Washington effective in a Federal enclave therein.

Murray v. *Joe Gerrick & Co.*, 291 U. S. 315.

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[1] Appendix, p. 25.
[2] Appendix, p. 20.

There the State Law created a monopolistic State compensation insurance administration to which employers were required to make reports and pay assessments. If they complied, their employees' *exclusive* remedy for injury or death was such insurance. If not, the injured employee, or, in case of death, his beneficiaries, was given an action at law for damages. In that case the action was of that nature. This Court held: (a) that the remedy afforded by that statute was not a "right of action" within the meaning of the Act of Congress of February 1, 1928; and (b) that the *purpose* of the Act was to prevent the *abatement* of causes of action for injuries resulting in death.

It is evident, therefore, that this Court interpreted the term "right of action," as used therein, to refer to *remedies* rather than to substantive rights.

That it was intended to merely render the so-called Lord Campbell's Acts of the various States applicable to Federal territory therein, is clearly shown by the statements of its sponsor, the late Senator Walsh of Montana, in explaining it to the Senate (Congressional Record, Vol. 69, Part 2, p. 1486).

Clearly, there is nothing in its provisions to indicate that the Act was intended to apply to the cause of action *created* by such a statute as the New York Labor Law.

It is respectfully submitted, therefore, that the motion to dismiss or affirm should be denied and jurisdiction of this appeal noted.

CLARENCE E. MELLEN,
Counsel for Appellant.

APPENDIX.

Labor Law (Consolidated Laws of New York, Chap. 31, Sec. 241).

"Sec. 241. PROTECTION OF EMPLOYEES ON BUILDING CONSTRUCTION OR DEMOLITION WORK. All contractors and owners, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

1. If the floors are to be arched between the beams thereof, or if the floors or filling in between the floors are of fireproof material, the flooring or filling in shall be completed as the building progresses.

2. If the floors are not to be filled in between the beams with brick or other fireproof material, the underflooring shall be laid on each story as the building progresses.

3. If double floors are not to be used, the floor two stories immediately below the story where the work is being performed shall be kept planked over.

4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces seasonably required for proper construction of the iron or steel work, for raising or lowering of material or for stairways and elevator shafts designated by the plans and specifications.

5. If elevators, elevating machines or hod-hoisting apparatus are used in the course of construction, for the purpose of lifting materials, the shafts or openings in each floor shall be inclosed or fenced in on all sides by a barrier of suitable height, except on two sides which may be used for taking off and putting on materials, and those sides shall

be guarded by an adjustable barrier not less than three nor more than four feet from the floor and not less than two feet from the edges of such shafts or openings. * * *"

The Constitution of the United States (Art. 1, Sec. 8, Clauses 1, 7, 17 and 18).

"The Congress shall have Power * * * To establish Post Offices and Post Roads; * * * To exercise exclusive Legislation in all cases whatsoever in such district (not exceeding ten Miles square) as may by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings; and

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.".

New York "Death" Act (Decedent Estate Law, Sec. 130; Consolidated Laws of New York, Chap. 13, Sec. 130).

"Sec. 130. Action by executor or administrator for negligence or wrongful act or default causing death of decedent.

The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which,

would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. * * *." (Remainder thereof not pertinent.)

Decision of Supreme Court, Trial Term (Hon. Harry E. Lewis, Justice), Dated November 30, 1937 R. 122; Not Officially Reported).

"Sadrakula, as admx., &c. v. James Stewart & Co., Inc., and ano. (corrected)—Action by the plaintiff against the general contractor, James Stewart & Co., Inc., for damages resulting from the death of her husband, an employee of a subcontractor. The proximate cause of the accident which occasioned decedent's death was the failure of the defendant to thoroughly plank over the beams as required by Section 241, subdivision 4 of the Labor Law. The defense of assumption of risk is not maintainable where, as here, the relationship of master and servant did not exist. There was likewise a failure to establish that plaintiff's decedent was guilty of any contributory negligence. I direct judgment in favor of the plaintiff for the sum of $23,125.

LEWIS,
J. S. C."

Decision of Appellate Division, Second Department (R. 125; *Sadrakula* v. *James Stewart Co., Inc.*, 254 N. Y. App. Div. 892).

"Action for damages for the death of plaintiff's decedent as a consequence of a violation by the defendant of Section 241, subdivision 4, Labor Law, in the course of the erection of a Federal post office building.

Judgment for plaintiff unanimously affirmed, with costs. (a) The evidence adequately established that the proximate cause of the decedent's death was defendant's failure to plank

over the steel beams in the western area of the "bay" as required by Section 241, subdivision 4, Labor Law. (b) The labor law provision was in effect at the place of the accident because that statute was enacted prior to the acquisition of the property by the Federal Government. The common law and statutes in effect before the act of cession remain in force until displaced by Congress (Kaufman v. Hopper, 220 N. Y. 184, 187, 115 N. E. 470, and cases cited therein). There has been no action by Congress displacing the Labor Law in respect of this Federal reservation. Such Federal action as has taken place is confirmatory of plaintiff's right to invoke the applicable State statutes (45 Stat. 54, tit. 16, U. S. Code, sec. 457)."

Act of Congress of February 1, 1928, Chap. 15 (Title 16, U. S. C. A. [Pocket Supp.], Sec. 457, 45 Stat. 54).

"**Action for death or personal injury within national park or other place under jurisdiction of United States; application of state law.** In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be."

Article 11 of General Municipal Law (Consolidated Laws of New York, Chap. 24, Secs. 210, 211, 212; L. 1909, Chap. 29, Secs. 210, 211, 212).

"*Sec. 210. United States may acquire land in cities.* The United States is hereby authorized to acquire by condemnation, purchase or gift in conformity with the laws of this state, one or more pieces of land not exceeding two acres in extent, in any city or village of this state, for the purpose of erecting and maintaining thereon a public building for the accommodation of post-offices and other governmental offices and other governmental offices in any such city or village."

"*Sec. 211. Certified copy of transfer to be filed.* Whenever the United States, by any agent authorized under the hand and seal of any head of an executive department of the government of the United States, shall cause to be filed and recorded in the office of the secretary of this state, certified copies of the record or transfer to the United States of any such pieces of land which had been acquired by the United States for the purposes specified in section two hundred and ten of this article, together with maps and descriptions of such lands by metes and bounds, exclusive jurisdiction, except as provided in section two hundred and twelve, is thereupon ceded to the United States over the lands so described, during the time that the United States shall be or remain the owner thereof."

"*Sec. 212. Jurisdiction of state not affected.* The jurisdiction ceded to the United States as prescribed by this article shall not prevent the execution on the land acquired for the purposes specified in section two hundred and ten of any process civil or criminal, issued under the authority of the state, except as such process might affect the property of the United States thereon."

Article 4 of the State Law (Consolidated Laws of New York. Chap. 57, Secs. 50 to 57, Inclusive; L. 1909, Sec. 50, as Amended by L. 1922, Chap. 14, and Secs. 51 to 57, Inclusive).

"*Sec. 50. Consent of state to purchase of land and record of conveyances.* The consent of the state of New York is hereby given to the purchase by the government of the United States, and under the authority of the same, of any tract, piece or parcel of land from any individual or individuals, bodies politic or corporate within the boundaries of this state, for the purpose of parade or manoeuver grounds, aviation fields, navy yards and naval stations, or for the purpose of erecting thereon lighthouses, beacons, light-house keepers' dwellings, hospitals, sanatoriums, works for improving navigation, post-offices, custom houses, fortifications, or buildings and structures for the storage, manufacture or production of supplies, ordnance, apparatus or equipment of any kind whatsoever for the use of the army or navy, and any other needful buildings and structures, and all deeds, conveyances or other papers relating to the title thereof shall be recorded in the office of the register, if any, or if not in the office of the county clerk, of the county where the said lands are situated."

"Sec. 51. Proceedings for acquiring title." (Detailed methods by which United States may acquire title when unable to agree with owners, or where owners are unknown, etc. Not pertinent herein.)

"*Sec. 52. Governor may execute deed or release.* Whenever the United States, by any agent authorized under the hand and seal of any head of an executive department of the government of the United States, shall cause to be filed and recorded in the office of the secretary of state of New York, certified copies of the record or transfer to the United States of any tracts or parcels of land within this state, which have been acquired by the United States for any of the purposes aforesaid, together with maps or plats and

descriptions of such lands by metes and bounds, and a certificate of the attorney-general of the United States that the United States is in possession of said lands and premises for either of the works of purposes aforesaid, under a clear and complete title, the governor of this state is authorized, if he deems it proper, to execute in duplicate, in the name of the state and under its great seal, a deed or release of the state ceding to the United States the jurisdiction of said tracts or parcels of land as hereinafter provided."

"*Sec. 53. Concurrent jurisdiction as to service of process.* The said jurisdiction so ceded shall be upon the express condition that the state of New York shall retain a concurrent jurisdiction with the United States on and over the property and premises so conveyed, so far as that all civil and criminal process, which may issue under the laws or authority of the state of New York, may be executed thereon in the same way and manner as if such jurisdiction had not been ceded, except so far as such process may affect the real or personal property of the United States."

"*Sec. 55. Delivery and filing of deeds and releases.* One of the deeds or releases so executed in duplicate shall be delivered to the duly authorized agent of the United States, and the other deed or release shall be filed and recorded in the office of the secretary of state of New York; and said deed or release shall become valid and effectual only upon such filing and recording in said office."

"*Sec. 56. Statement to be published in session laws.* The secretary of state shall cause to be printed in the session laws of the year succeeding the filing in his office of said deed, a statement of the date of the application of the United States for said deed and a copy of the description of the lands so conveyed or ceded, together with the date of the recording of said deed in the office of the said secretary of state."

"*Sec. 57. Article not to apply to Orange county.* This article shall not apply to the county of Orange."

State Law. Sec. 37 (Consolidated Laws of New York. Chap. 57. Sec. 37):

"*Sec. 37. Saving clause.* The adoption of this article shall not be construed to cede to the United States any territory or jurisdiction over any territory not so ceded by the laws repealed by the consolidation of the general laws of the state of which this article is a part, or to change the terms or conditions upon which such cessions were originally made."

United States Code, Title 40, Sec. 255 (R. S. [2nd Ed., 1878], Sec. 355).

"**Title to land to be purchased by United States.** No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any customhouse, or other public building, of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. * * *"
(Omitted part not pertinent.)

Defendant's Exhibit A for Identification (R. 124: Excluded, R. 111; Assignment of Errors, Item 6).

Contract between James Stewart & Co., Inc., and the United States of America, Treasury Department, Procurement Division, dated November 9, 1931, referred to in paragraph "Second" of the Amended Complaint, in which said James Stewart & Co., Inc., is described as "the contractor," contained the following provisions, among others:

"21. PROTECTION OF PUBLIC AND PROPERTY.—The contractor shall protect all materials and work

whether incorporated in the building or not, against injury from any cause, and shall provide and maintain all necessary guards, lights, etc., for the protection of the public, and he shall comply with all Municipal ordinances which apply to the use of sidewalks and streets or alleys for building operations, but such ordinances do not apply inside of the lot lines. He shall be held responsible for any damage or injury to persons or property which may occur as a result of his fault or negligence in the prosecution of the work."

"2. PERMITS.—The contractor shall without additional expense to the Government obtain all required licenses, permits, etc. This applies to work outside the lot lines, the use of streets and sidewalks, the protection of public and traffic, connections to utility service lines, etc. State or Municipal Building Regulations do not apply to work inside the Government's lot lines."

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 251.

JAMES STEWART & CO., INC.,

Appellant,

against

CATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of NICHOLAS SADRAKULA, deceased,

Appellee.

Appeal from the Supreme Court of the State of New York.

APPELLANT'S BRIEF.

CLARENCE E. MELLEN,
Counsel for Appellant.

The Hecla Press : : New York City 39

INDEX.

SUBJECT INDEX.

	PAGE
1. Official Report of Opinion Delivered in Court Below.	1
2. Grounds Upon Which the Jurisdiction of This Court Is Invoked.....	2
3. Statement of Case.....	3
4. Specification of Errors To Be Urged.....	4
5. Summary of Argument.....	5
6. Argument.....	6
A. The judgment herein being based exclusively upon the violation of a duty created by statute (Sec. 241, par. 4, of the Labor Law of New York), its validity is dependent upon the validity of that statute when so applied.	6
B. (1) The statute (Labor Law, Sec. 241) was applied to a building located in territory within the exclusive jurisdiction of the United States.....	8
(2) The statute (Labor Law, Sec. 241) was not effective in that Federal enclave and its application therein is repugnant to Article 1, Section 8 of the Constitution of the United States.....	12
C. Appellant's contract with the United States was an instrumentality of the Federal Government and, as applied herein, the statute (Labor Law, Sec. 241) conflicted and interfered with that contract and its performance.....	18
D. The exclusion from evidence of Defendant's Exhibit A for Identification (R. 121, offered R. 110) was reversible error.....	20

TABLE OF CASES AND AUTHORITIES.

CASES.

	PAGE
Amberg v. Kinley, 214 N. Y. 531	7
American Ins. Co. v. Canter, 1 Pet. (26 U. S.) 511	13
Anderson v. Chicago & N. W. R. R. Co., 162 Neb. 578, 168 N. W. 196	21
Arlington Hotel Co. v. Fant, 278 U. S. 349	13, 15
Arizona v. California, 283 U. S. 423	15, 20
Atkinson v. State Tax Commission, 303 U. S. 20	3, 12
Benson v. United States, 146 U. S. 325	11
Callan v. Pugh, 54 N. Y. App. Div. 545	7
Chi., R. I. & Pac. R. R. Co. v. McGlinn, 114 U. S. 542	13, 15, 21
Collins v. Yosemite Park & Curry Co., 304 U. S. 518	12
Crook v. Old Point Comfort, 54 F. (2d) 669	15
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282	3
Darweger v. Staats, 267 N. Y. 290	10
De Haen v. Rockwood Sprinkler Co., 258 N. Y. 350	7
Dickenson v. Stiles, 246 U. S. 631	3
Doremus v. Auerbach, 176 N. Y. App. Div. 512, aff'd without opinion, 223 N. Y. 719	6
Dougherty v. Pratt Institute, 244 N. Y. 111	6
Educational Films Corp. v. Ward, 282 U. S. 379	15
Farley v. Scherno, 208 N. Y. 269	11, 14
Federal Land Bank v. Crosland, 261 U. S. 374	19
Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525	11
Graves v. New York, 304 U. S. 466	18
Hamburg-American Steamship Co. v. Grube, 196 U. S. 407	3

PAGE

Hogan v. Arbuckle, 73 N. Y. App. Div. 590 7
Home Insurance Co. v. Dick, 281 U. S. 397 3

James v. Dravo Contracting Co., 302 U. S. 134 ....10, 11, 19
Joyce v. Convent Constr. Co., 155 N. Y. App. Div. 586.. 6

Lotocka v. Elevator Supplies Co., 246 N. Y. 295 7

Maryland Casualty Co. v. United States, 261 U. S. 342. 21
Murphy v. Altman, 28 N. Y. App. Div. 472 7
Murray v. Joe Gerrick & Co., 291 U. S. 315 .....15, 17
McCarthy v. Packard Co., 105 N. Y. App. Div. 436, aff'd on opinion below, 182 N. Y. 555 15
McCulloch v. Maryland, 4 Wheat. 316 20
McLean v. Studebaker Bros. Co., 221 N. Y. 475 6
McNamara v. Eastman Kodak Co., 220 N. Y. 182 7

Near v. State of Minnesota, 283 U. S. 697 3

Oklahoma City v. Sanders, (C. C. A.) 94 F. (2d) 323..14, 15
Osborn v. Bank of United States, 9 Wheat. 738 20

People v. Hillman, 246 N. Y. 467 11
People ex rel. Levering v. Leo, 112 N. Y. Misc. R. 325.. 15
Pittman v. Home Owners' Loan Corp., U. S. , 84 L. Ed. (Adv. No. 1) 16 19

Racine v. Morris, 261 N. Y. 240 .....7, 14

Sadrakula v. James Stewart & Co., Inc., 254 N. Y. App. Div. 892, aff'd 280 N. Y. 651 ..... 1, 8
Ex parte Siebold, 100 U. S. 371 14
Silas Mason Co. v. Tax Commission of Washington, 302 U. S. 186 .....3, 8, 11, 12
Sieger v. Crow Constr. Co., 235 N. Y. App. Div. 587 6
Steele v. Halligan, 229 Fed. 1011 14
Surplus Trading Co. v. Cook, 281 U. S. 647 11
Swenson v. Wills, Inc., 152 N. Y. App. Div. 711 7

PAGE
United States v. San Francisco Bridge Co., 88 Fed. 891 15
United States v. Unzeuta, 281 U. S. 138 11

Vilas v. City of Manila, 220 U. S. 138 ..... 13, 14
Vollsted v. Mollar, Inc., 238 N. Y. App. Div. 705 7

Ward v. Krinsky, 259 U. S. 503 3
Western Union Tel. Co. v. Chiles, 214 U. S. 274 13
Western Union Tel. Co. v. Texas, 105 U. S. 460 20

STATUTES.

Act of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 936, 937 (28 U. S. C. A., Sec. 344), amending Section 237 of the Judicial Code (Appendix) 2
Act of January 31, 1928, Chap. 14, 45 Stat. 54, as amended by Act of April 26, 1928, Chap. 440, 45 Stat. 466 (28 U. S. C. A., Secs. 861-A and 861-B) (Appendix) 2
Act of February 1, 1928, 45 Stat. 54 (16 U. S. C. A., Sec. 457) 16
Baldwin's New York Code of Ordinances, Chap. 5, Art. 1, Secs. 4, 9, 10, 190 ..... 14, 15
Constitution of State of New York, Art. 3, Sec. 1 10
Constitution of United States, Art. 1, Sec. 8 (Appendix) 3, 5, 12, 18, 24
16 U. S. C. A., Sec. 457 16
40 U. S. C. A., Sec. 255 (Appendix) 9, 28
40 U. S. C. A., Secs. 285, 341, 342 (Appendix) 16, 18, 19, 21
Decedent Estate Law of New York, Sec. 130 (Consolidated Laws of New York, Chap. 13, Sec. 130) 17
General Municipal Law of New York, Secs. 210, 211, 212 (Appendix) 8, 9, 10, 25
Labor Law of New York:
Sec. 241 (Appendix) 4, 12, 21, 23
Sec. 241 15
Art. 10 (Consolidated Laws of New York, Chap. 31, Art. 10) 2, 14

PAGE

McKinney's Consolidated Laws of New York, Book 56, Sec. 50 9

New York Session Laws:

Laws 1896, Chap. 391 9

Laws 1899, Chap. 242 9

Laws 1901, Chap. 466, Sec. 407 9

Laws 1907, Chap. 375, Sec. 1 9

Laws 1910, Chap. 109, Sec. 1 9

Resolution of Congress, September 11, 1841 (5 Stat. at L. 468), 40 U. S. C. A., Sec. 255 (Appendix) 9, 11

State Law of New York, Secs. 50-57, inclusive (Appendix) 8, 9, 10, 12, 26

OTHER AUTHORITIES.

American Law Institute, Restatement, "Torts," Secs. 286, 340 7

Columbia Law Review, Vol. 38, p. 133 13

Congressional Record, Vol. 81, No. 42, p. 2159 18

Halleck, International Law, Vol. 2, Chap. 34, Sec. 14 .. 13

9 Opin. Attorneys General 14

Supreme Court of the United States

OCTOBER TERM, 1939

No. 251

JAMES STEWART & CO., INC.,
Appellant,
against
KATHERINE SADRAKULA, as Administratrix of the goods, chattels and credits which were of Nicholas Sadrakula, deceased,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF.

1.

Official Report of Opinion of Court Below.

The only opinion below, which is officially reported, is that of the Appellate Division, Second Department (R. 131*):

Sadrakula, as Admx. v. *James Stewart & Co., Inc.*, 254 N. Y. App. Div. 892.

The Court of Appeals delivered no opinion (*Sadrakula, as Admx.* v. *James Stewart & Co., Inc.*, 280 N. Y. 651) and the opinion of Lewis, J., in the trial court (R. 122*) is not officially reported.

* Appendix, page 25, *post*.

2.

Grounds Upon Which the Jurisdiction of This Court Is Invoked.

This is a civil action in which appellant had been held liable in damages for the death of appellee's decedent. The accident occurred during the construction of a post office building, which appellant was engaged in erecting, pursuant to a contract with the Treasury Department of the United States (R. 5; Deft's. Ex. A for Iden., R. 121, offered R. 110), on land which had been purchased by the United States for that purpose, with the consent of the State Legislature (R. 17, 18).

Appellant was held liable solely upon the ground that the cause of decedent's death was appellant's failure to comply with the following requirement of a State statute [*McKinney's Consolidated Laws of New York*, "Labor Law," Book 31, Sec. 241, par. 4; Consolidated Laws of New York, Chap. 31, Sec. 241(4); Laws of 1921, Chap. 50, Sec. 241, as amended by Laws of 1922, Chap. 1, and Laws of 1930, Chap. 693]:

> "*Protection of employees on building construction or demolition work.* All contractors and owners, when constructing or demolishing buildings, shall comply with the following requirements:
>
> * * * * * *
>
> 4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces seasonably required for proper construction of the iron or steel work, for raising or lowering of materials or for stairways and elevator shafts designated by the plans and specifications."

The jurisdiction of this Court is invoked under the Act of February 13, 1925, Chapter 229, Section 1* (43 Stat. 936, 937; 28 U. S. C. A., Sec. 344), amending Section 237 of the Judicial Code, and Act of January 31, 1928, Chap. 14; 45 Stat. 54, as amended by Act of April 26, 1928, Chap. 440;

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* Appendix, p. 34, *post*.

45 Stat. 466 (28 N. S. C. A. Secs. 861-A and 861-B), upon the ground that by the decision herein, the highest court of New York sustained the validity of that statute against appellant's contention that, as applied, it is repugnant to Article 1, Section 8, of the Constitution and to the laws of the United States (R. 98, 99, 112, 113, 134-135).

This Court has jurisdiction to determine the constitutional validity of such application of a State statute.

Hamburg-American Steamship Co. v. *Grube*, 196 U. S. 407, 414;
Dickenson v. *Stiles*, 246 U. S. 631, 632;
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 288, 289;
Ward v. *Krinsky*, 259 U. S. 503, 507, 510;
Home Ins. Co. v. *Dick*, 281 U. S. 397, 406, 407;
Near v. *State of Minnesota*, 283 U. S. 697, 709, 722, 723;
Silas Mason Co. v. *Tax Commission of Washington*, 302 U. S. 187, 188, 189, 190;
Atkinson v. *State Tax Commission*, 303 U. S. 20, 21.

3.

Statement of Case.

This is a civil action, brought by appellee to recover damages for the death of her intestate, resulting from an accident which occurred October 24, 1935, in a post office building which was then under construction in New York City. Appellant, as general contractor, was erecting that building, pursuant to a contract with the Treasury Department of the United States (R. 5, 6, 7, 131), upon a site which the latter had purchased for that purpose in 1931, with the consent of the State Legislature (R. 17, 18).

Decedent's employer contracted to furnish and install certain equipment for mixing and conveying concrete, for appellant's use in the building during its construction (Plff's. Ex. 3, R. 118, offered R. 34).

Decedent was the foreman in charge of the installation thereof, which was started the day before the accident (R. 25, 27). At that time, the structural steel for the section of the building in which it was to be placed, had been completed, but was entirely open, except at the first tier. There, the floor had been completed in all but two adjoining bays. Those bays were about 30 feet by 20 feet in area, divided, lengthwise, into three panels each (R. 37, 38, 43).

The equipment, consisting of a material bin, concrete mixer and bucket-hoist, was to be installed in those bays. As these items were to be integrated, the bin, which had a measuring device and hopper in the bottom, was to be placed in one of the open bays, on the first tier of steel; the bucket-hoist, in the middle panel of the adjoining bay; and the concrete mixer, cribbed up on lumber, on the ground, at a point midway between the bin and the hoist (R. 38, 39, 103, 104, 105, 106, 107).

As the guide-rails for the hoist could be separated by only the width of the bucket (55 inches) it was necessary to place planks, called bucking-pieces, across the panel and attach the rails thereto. The part of the panel in which they should be placed depended upon the precise position in which the bin and concrete mixer were installed; hence, determination thereof was decedent's duty (R. 42).

Prior to the accident, the bin had been placed in position and the guide-rails for the hoist erected to a point above the second tier (R. 30, 75, 76). Those rails could be erected only in "open steel" (R. 39).

Decedent's death resulted from injuries sustained when he fell from the first tier to the ground beneath (R. 18). No one saw him fall, but he had been seen a moment before, standing on the plank marked "M" on Plaintiff's Exhibit 1 (R. 116, offered R. 32), holding a long stick with which he intended to measure one of the guide rails (R. 65, 66, 85, 86).

Appellant was held liable upon the ground that decedent's death resulted from its failure to "thoroughly plank over" the opening through which he fell, as required by the Labor Law of New York, Section 241,* paragraph 4 (R. 122,† 131‡).

Appellant contended that, under Article 1, Section 8 of the Federal Constitution,§ that statute was not validly applicable (R. 98, 99, 112, 113).

4.

Specification of Errors to Be Urged.

The courts below erred:

1. In holding that Labor Law, Section 241(4) applied in the place where the accident occurred (Assignment of Errors 1, 2, 4, 5, R. 142, 143)†;

2. In holding that said statute applied to a Federal instrumentality (Assignment of Errors 3, R. 142)‡;

3. In excluding from evidence Defendant's Exhibit A for Identification (R. 121, offered R. 110, 111), an excerpt from the contract between appellant and the Treasury Department of the United States, in which it was specified that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines" (Assignment of Errors 6, R. 143).

5.

Summary of Argument.

A. As the judgment appealed from is based exclusively upon the violation of a duty created by statute (Sec. 241, par. 4 of the Labor Law of New York), its validity is dependent upon the validity of that statute when so applied.

B. (1) The statute was applied to a building located in territory within the exclusive jurisdiction of the United States; and

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* Appendix, p. 23, *post*.
† Appendix, p. 24, *post*.
‡ Appendix, p. 25, *post*.
§ Appendix, p. 24, *post*.
Appendix, p. 29.

(2) The statute was not effective in that Federal enclave, and its application therein was repugnant to Article 1, Section 8 of the Constitution of the United States.

C. Appellant's contract with the United States was an instrumentality of the Federal Government and, as applied herein, said statute conflicted and interfered with that contract and its performance.

D. The exclusion from evidence of Defendant's Exhibit A for Identification (R. 121, offered R. 110, 111) was reversible error.

6.

Argument.

A.

The judgment herein being based exclusively upon the violation of a duty created by statute* (Section 241, paragraph 4 of the Labor Law of New York), its validity is dependent upon the validity of that statute when so applied.

Under the evidence herein, no *common law* duty rested upon appellant to protect decedent from the dangerous condition which produced his death. No *active* wrong was charged. The dangers of the condition at the place of the accident were open, obvious, known to decedent and inherent in the nature of his work (R. 27, 32, 33, 39, 43, 44, 46). Hence, no duty was imposed upon appellant by the common law to protect him therefrom.

Dorcmus v. *Auerbach*, 176 N. Y. App. Div. 512, 515-516, aff'd, without opinion, 223 N. Y. 719;
McLean v. *Studebaker Bros. Co.*, 221 N. Y. 475, 476, 477, 478;
Dougherty v. *Pratt Institute*, 244 N. Y. 111, 113;
Sieger v. *Crow Constr. Co.*, 235 N. Y. App. Div. 587, 588, 589;
Joyce v. *Concent Ave. Constr. Co.*, 155 N. Y. App. Div. 586, 588, 589, 590;

Swenson v. *Wills, Inc.*, 152 N. Y. App. Div. 711, 712, 716;

Hogan v. *Arbuckle*, 73 N. Y. App. Div. 590, 592, 593;

Callan v. *Pugh*, 54 N. Y. App. Div. 545;

Murphy v. *Altman*, 28 N. Y. App. Div. 472, 474, 475;

American Law Institute, Restatement "Torts," Sec. 340.

The judgment herein is based exclusively upon appellant's failure "to thoroughly plank over the (floor) beams" from which decedent fell (R. 112, 122,* 131†). That duty arises solely from the mandate of the statute in question (Labor Law, Sec. 241[4]‡), and the cause of action asserted herein rests upon that statute.

Racine v. *Morris*, 201 N. Y. 240, 242, 243, 244, 245, 246;

Amberg v. *Kinley*, 214 N. Y. 531, 534, 535;

McNamara v. *Eastman Kodak Co.*, *supra* (220 N. Y. 182, 183);

Lotocka v. *Elevator Supplies Co.*, 246 N. Y. 295, 297, 299;

De Haen v. *Rockwood Sprinkler Co.*, 258 N. Y. 350, 353-355;

Vollstedt v. *Mollar, Inc.*, 238 N. Y. App. Div. 705, 707;

American Law Institute, Restatement "Torts," Sec. 286.

It is clear, therefore, that the decision of the Courts below, upholding the validity of that application of the statute, was essential to sustain the judgment.

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* Appendix, p. 24.
† Appendix, p. 25.
‡ Appendix, p. 23.

B.

1.

The statute (Labor Law, Sec. 241) was applied to a building located in territory within the exclusive jurisdiction of the United States.

It was stipulated that the building in which the accident occurred was located upon land purchased by the United States in 1931, with the consent of the State Legislature, as the site for a post office (R. 17, 18), which was being erected by appellant, pursuant to a contract with the Federal Government, dated November 9, 1934 (R. 5, 110). The accident occurred therein a year later (R. 5, 18).

In the courts below appellee did not question that the United States had exclusive jurisdiction thereof, nor did those Courts deny it. On the contrary, the Appellate Division, which delivered the only opinion in which that subject was mentioned, characterized it as a "Federal reservation" (R. 131; 254 N. Y. App. Div. 892*).

However, in her motion to dismiss or affirm in this Court, appellee argued that Federal jurisdiction was not acquired until certified copies of the documents of title were filed with the Secretary of State of New York, by an agent of the United States, on December 26, 1935, about two months after the accident.

That argument was based upon Section 211 of the General Municipal Law† (Consolidated Laws of New York, Chap. 24, Sec. 211; Laws of 1909, Chap. 29, Sec. 211) and Section 52 of the State Law‡ (Consolidated Laws of New York, Chap. 57, Sec. 52; Laws of 1909, Chap. 59, Sec. 52).

As that question involves the extent of the jurisdiction of the United States, it is a Federal question within the jurisdiction of this Court.

Silas Mason Co. v. *Tax Commission of Washington*, 302 U. S. 186, 197, and cases cited.

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* Appendix, p. 25.
† Appendix, pp. 25, 26.
‡ Appendix, pp. 26, 27, 28.

Prior to 1896, all consents to the purchase of land by the United States were granted by special statutes. The first *general* statute, L. 1896, Chap. 391, from which Sections 50 to 57, inclusive, of the State Law were derived (McKinney's Consolidated Law, "State Law," Book 56, Sec. 50, and footnote), granted consent to the purchas of "any tract, piece or parcel of land * * * *situate upon or adjacent to the navigable waters*" * of the State, for a number of purposes, including post offices, and provided for recording the documents of title with the appropriate officer of the county in which the land was situated. The limitation to "lands situated upon or adjacent to the navigable waters" of the State was not removed until 1910 (L. 1910, Chap. 109, Sec. 1).

In the interim, therefore, consent to the purchase of land *not* upon or adjacent to such waters was obtainable only by special act of the Legislature. To meet that situation with respect to *inland* sites for *public buildings*, as to which such "consent" was required before any public money could be expended thereon (Resolution of Congress, September 11, 1841 [5 Stat. at L. 468]; 40 U. S. C. A., Sec. 255†), consent was granted, in 1899, to the acquisition "in any city," of land, "not exceeding two acres" in area, as sites for buildings to accommodate "post offices and other governmental offices" (L. 1899, Chap. 242) and, in 1907, such consent was extended to such sites in villages, as well as in cities (L. 1907, Chap. 375, Sec. 1).

As a result, since 1910, there have been two "consent" statutes; one to the "purchase" of *any* land "within the boundaries" of the State, for *many* purposes, including post offices (State Law, Sec. 50); and the other, to the acquisition "by condemnation, purchase or gift" of *not over two acres*, in cities or villages, as sites for buildings to accommodate "post offices and other governmental offices" (General Municipal Law, Sec. 210).

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* Italics supplied.

† Appendix, p. 28.

We believe it reasonable to assume that, in enacting those statutes, the Legislature contemplated that there was land *then owned* by the United States, the *jurisdiction* of which remained in the State, because of lack of "consent" or "cession" (*James* v. *Dravo Contracting Co.*, 302 U. S. 134, 141, 142; and cases cited therein). By Section 211 (General Municipal Law) and Section 52 (State Law), a general method was therefore provided by which, in such cases, jurisdiction would be *ceded* upon the recordation of the documents of title thereto, with the Secretary of State.

Evidently, therefore, the consent to *future* purchases contemplated by Clause 17 was intended to be given by both statutes. Because of its limited scope, that granted by Section 210 (General Municipal Law) is fully included within that granted by Section 50 (State Law). As there is no evidence that the land herein involved is not *over* two acres in area, the General Municipal Law does not apply. Hence, the State Law, which contains no such limitation (Sec. 50), is alone applicable.

By Section 52 thereof, the Governor is *authorized* to execute formal *cessions* of jurisdiction, "if he deems it proper," upon the filing, by an agent of the United States, of certified copies of the documents of title of any tracts of land which "*have been** acquired" for any of the purposes specified in Section 50.

To construe those provisions as a reservation of the consent given in Section 50, pending compliance therewith, necessitates the conclusion that the legislative intent was to *delegate* to the executive *discretionary* authority to *nullify* the consent given by Section 50. In effect, therefore, to delegate to the executive the authority to grant or refuse the consent which Clause 17 specifies must be given by the "Legislature." Apart from the doubtful validity of such delegation of legislative authority (Constitution of New York, Art. 3, Sec. 1; *Darweger* v. *Staats*, 267 N. Y. 290, 305, *et seq.*), we believe that, properly interpreted, the statute discloses no such legislative intent.

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* Italics supplied.

That, under Clause 17, the State may grant its consent with qualifications reserving *jurisdiction*, not inconsistent with the Government's use of the land, is *now* settled.

James v. *Dravo Cont'g Co.*, *supra* (302 U. S.), 147, 148.

That it may *refuse* its consent is, of course, clear. However, here consent is *given* (Sec. 50). The effect of the statute (Sec. 52), as appellee would construe it, is to fix the method by which the United States must *accept* it.

When that statute was enacted, although the question had not been decided, the opinion had been uniformly expressed, both by the courts and the Attorney General of the United States, that formal *cession* of jurisdiction was unnecessary when *consent* was obtained, pursuant to Clause 17, Section 8, Article 1 of the Federal Constitution, because, in such cases, the Constitution itself, *proprio vigore*, transferred jurisdiction.

Ft. Leavenworth R. Co. v. *Lowe*, 114 U. S. 525, 537, 538, 539;
Benson v. *United States*, 146 U. S. 325, 330, 331;
United States v. *Unzeuta*, 281 U. S. 138, 142;
Surplus Trading Co. v. *Cook*, 281 U. S. 647, 652;
James v. *Dravo Contracting Co.*, *supra* (302 U. S. 142);
Silas Mason Co. v. *Tax Comm. of Washington*, 302 U. S. 186, 197;
Farley v. *Scherno*, 208 N. Y. 269, 271;
People v. *Hillman*, 246 N. Y. 467, 479;
9 *Opin. Attorneys General*, 129, 130.

Then as now, Congress *required* that such consent be obtained *before* the expenditure of any public money upon land acquired for "public buildings" (Resolution of Congress, Sept. 11, 1841 [5 Stat. at L. 468]; 40 U. S. C. A., Sec. 255*; 9 *Opin. Attorneys General*, 129, 130), and acceptance thereof

* Appendix, p. 28, *post*.

is to be presumed in the absence of evidence to the contrary (*Silas Mason Co.* v. *Tax Commission*, 302 U. S. 207; *Atkinson* v. *Tax Commission*, 303 U. S. 23).

Although the *power* of the State, after granting consent, to impose restrictions upon the *manner* in which the Federal Government must *accept* it, is open to serious doubt, we deem it unnecessary to press that question.

We submit that, properly construed, Section 52 applies only to land acquired by the United States, either *prior* to the enactment of that statute and *without* consent, or, to that acquired thereafter, but in a *manner*, or for a purpose as to which consent was not given by Section 50.

So construed, the entire statute is consistent and effectuates the obvious purpose of providing a general and uniform method by which the United States *would* acquire jurisdiction in all cases contemplated by Clause 17 and *might* acquire it in such *other* cases as the executive departments of both governments should deem desirable.

Cf. Collins v. *Yosemite Park & Curry Co.*, 304 U. S. 518, 528.

The building to which the statute in question (Labor Law) was held applicable, was, therefore, within the exculsive jurisdiction of the United States by virtue of Section 8, Clause 17 of Article 1 of the Federal Constitution.

2.

The statute (Labor Law, Sec. 241) was not effective in that Federal enclave and its application therein is repugnant to Article 1, Section 8 of the Constitution of the United States.

When the United States acquired jurisdiction of the enclave, the Labor Law was in effect *throughout* the State. It was held by the courts below that, as it had not been displaced by Congress, it therefore remained effective in this Federal enclave (R. 131).

It is unquestionably the rule that upon such transfer of jurisdiction, certain State laws, termed municipal, govern

ing the personal and property rights of the inhabitants, in their relations with one another, remain effective, unless they conflict with the poltical character, institutions or Constitution of the United States. That rule, borrowed from international law, results from the necessity of avoiding the impossible alternative, that, until action by Congress, there would be *no* law therein for the protection of such rights.

American Ins. Co. v. *Canter*, 1 Pet. (26 U. S.) 511, 541;
Chicago, R. I. & Pac. R. R. Co. v. *McGlinn*, 114 U. S. 542, 546, 547;
Western Union Tel. Co. v. *Chiles*, 214 U. S. 274, 277, 278;
Vilas v. *City of Manila*, 220 U. S. 345;
Arlington Hotel Co. v. *Fant*, 278 U. S. 439;
Halleck, International Law, Chap. 34, Sec. 14;
38 *Columbia Law Review*, p. 133.

That rule, as stated in *Halleck's International Law* (Vol. 2, Chap. 34, Sec. 14, p. 516), which was cited by Mr. Justice Field in the leading case on this subject, *Chicago, R. I. & Pac. R. R. Co.* v. *McGlinn*, *supra* (114 U. S. 546), is:

> "'The laws of a conquered country,' said Lord Mansfield, 'continue in force until they are altered by the conqueror; * * *.' This refers to the municipal laws of the conquered country, but not to its political laws, or to the relations of the inhabitants with the government. On the transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired the territory; * * * The law, which may be denominated *political*, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State. This is a well-settled rule of the law of nations. Its provisions are clear and simple, and easily understood; but it is not so easy to dis-

tinguish between what are *political* and what are *municipal* laws, and to determine *when* and *how far* the Constitution and laws of the conqueror change or replace those of the conquered."

Implicit in such rule is the assumption that laws which thus "continue in force" have been *adopted* by the new government *as its own*. Such assumption is necessitated by the fact that, after termination of the legislative power of the government by which they were promulgated, sanction for their continued potency must be found in the *existing* legislative power.

Ex parte Siebold, 100 U. S. 371, 388;
Vilas v. *City of Manila*, 220 U. S. 345;
Silas Mason Co. v. *Tax Commission*, 302 U. S. 186, 197;
Oklahoma City v. *Sanders* (C. C. A.), 94 F. (2d) 323;
Steele v. *Halligan*, 229 Fed. 1011, 1018;
Farley v. *Scherno*, 208 N. Y. 269.

As such "adoption" necessarily involves the exercise of legislative power, it should be only *presumed* as to laws which are clearly within the purpose of the rule and which, when *applied*, will not interfere with the activities of the government.

The Labor Law (Consolidated Laws of New York, Chap. 31) is a comprehensive code of regulations designed to promote the health, welfare and personal safety of those engaged in many different occupations. Article 10 thereof, consisting of three sections, of which Section 241 is one, relates to the construction of buildings. In New York City, its *enforcement* is entrusted to the superintendent of buildings, a municipal official, who is also charged with the enforcement of the city Building Code (Labor Law, Sec. 242; *Baldwin's New York Code of Ordinances*, Chap. 5, Art. 1, Secs. 4, 9, 10), a municipal ordinance which, having been confirmed by the State Legislature (L. 1901, Chap. 466, Sec. 467), has the force of a statute (*Racine* v. *Morris*, 201 N. Y.

240, 244). That official is empowered to enter upon all premises in which such work is being conducted, require compliance with the requirements of both the Labor Law and the Building Code, and, if he deems it necessary, *stop all work*, pending compliance with their requirements (Labor Law, Sec. 242; *Baldwin's New York Code of Ordinances*, Chap. 5, Secs. 10 and 190; *People ex rel. Levering* v. *Leo*, 112 N. Y. Misc. R. 325).

Those provisions for its executive administration and enforcement clearly distinguish this statute from those which have been classified as "municipal."

> Cf. *Chicago, R. I. & Pac. R. R. Co.* v. *McGlinn*, *supra* (114 U. S. 542);
> *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439;
> *Crook* v. *Old Point Comfort*, 54 F. (2d) 669;
> *McCarthy* v. *Packard Co.*, 105 N. Y. App. Div. 436; aff'd on opinion below, 182 N. Y. 555.

Exercise of such *executive* authority in Federal territory would clearly infringe upon Federal sovereignty.

> *Arizona* v. *California*, 283 U. S. 423, 451, 452;
> *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 388, 389;
> *Oklahoma City* v. *Sanders* (C.C.A.), 94 F. (2d) 323, 326 *et seq.*;
> *United States* v. *San Francisco Bridge Co.*, 88 Fed. 891, 894, 895.

May it then be reasonably inferred that the Federal Government intended that this statute should be only *partially* effective in its territory?

In an analogous situation, this Court, through Mr. Justice Roberts, said (*Murray* v. *Joe Gerrick & Co.*, 291 U. S. 315, 319):

> "If it were held that beneficiaries may sue, pursuant to the compensation law, we should have the *incongruous situation* that this law is *in part* effective and in part ineffective within the area under the jurisdiction of the federal government." (Italics supplied.)

In that case, the statute under consideration was the Washington Workmen's Compensation Act and the question was its applicability in Federal territory under the Act of Congress of February 1, 1928 (45 Stat. 54; 16 U. S. C. A., Sec. 457, quoted below). As in this case, the answer was dependent upon the legislative intent. It is clear, therefore, that the incongruity of such *partial* applicability of the statute was recognized as a cogent reason for declining to *attribute* such intention to Congress.

Even though its *executive* provisions be deemed eliminated, the mandates thereof, as applied herein, are not "municipal", but "political".

The enclave herein was a mere building site. The *only* building therein to which the statute *could* apply, was to be constructed pursuant to a contract with the United States. *Complete* control of its construction was vested in the Secretary of the Treasury by Congress (40 U. S. C. A., Secs. 285, 341, 342*). The mandate of the statute would, however, if applicable, *supersede* any orders or directions given in the exercise of that authority.

It was said, in effect, by the Court below† that an intention to adopt the mandates of the statute is confirmed by the Act of Congress of February 1, 1928 (45 Stat. 54; 16 U. S. C. A., Sec. 457), which provides:

> "*Action for death or personal injury within national park or other place under jurisdiction of United States; application of state law.* In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any state, such *right of action* shall exist as though the place were under the jurisdiction of the state within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained

* Appendix, p. 30.
† Appendix, p. 25.

in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be."

That statute has been before this Court for construction in only one case, *Murray* v. *Joe Gerrick & Co., supra* (291 U. S. 315). It was then held that the remedies granted by the Washington Workmen's Act were not rights of action, within the meaning thereof.

In that case, the Washington statute, after abolishing the common law remedies previously enjoyed by servants, for injuries received through the negligence of their masters and substituting a system of compensation, regardless of negligence, created a new right, enforceable by action, against an employer who failed to comply therewith. Obviously, the *right* for which the remedy by civil action was granted, was *created* by the statute.

So here, the *right*, if any, was *created* by the statute, the *remedy* being granted by Section 130 of the Decedent Estate Law (Consolidated Laws of New York, Chap. 13, Sec. 130), the effectiveness of which, under the above-quoted Act, is not questioned.

Whether considered under that Act of Congress, or under the rule of general law, the ultimate question is one of *intention*.

As has been shown, the statute involved herein is such that it *could not* be effective in its *entirety*, in Federal territory, and its *mandates*, when applied in territory devoted entirely to Federal projects, are such that their *adoption* therein should not be presumed. In fact, such presumption would seem contrary to the actual intent of Congress, as evidenced by its failure to enact several bills introduced therein, which had for their object the adoption of State safety laws to all Federal projects. The most recent of which we are aware, introduced in the 75th Congress (Feb-

ruary 24, 1937), by Senator Sheppard (S. 1744; Congressional Record, Vol. 81, No. 42, p. 2139), read:

> "Be it enacted," etc., "That all agencies of the Federal Government undertaking construction of public buildings and other public works under Federal law shall observe, and shall require all employees and contractors to observe the various State safety laws, as well as safety laws and regulations of the Federal Government."

We submit, therefore, that the State statute in question (Labor Law, Sec. 241) was not in force in this Federal enclave and its *application* therein is repugnant to Article 1, Section 8 of the Federal Constitution.

C.

Appellant's contract with the United States was an instrumentality of the Federal Government and, as applied herein, the statute (Labor Law, Sec. 241) conflicted and interfered with that contract and its performance.

The accident happened in a post office building which was being erected pursuant to a contract with the Treasury Department of the United States (R. 5, 18, 110).

The Treasury Department is authorized by Congress to design such buildings, prepare the plans and specifications therefor, enter into contracts for their construction and supervise their erection.

40 U. S. C. A., Secs. 285, 341, 342.*

The exercise of that authority is, therefore, the performance of a governmental function.

Constitution of the United States, Art. 1, Sec. 8, Clauses 7 and 18;
Graves v. *New York*, 304 U. S. 466, 477.

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* Appendix, p. 30.

The *contract* of the Secretary of the Treasury with appellant in this case was, therefore, an instrumentality of the Federal Government.

James v. *Dravo Contracting Co.*, *supra* (302 U. S. 149, 150, 155);
Pittman v. *Home Owners' Loan Corp.*, ... U. S. ...., 84 L. Ed. (Adv. No. 1) 16, 18;
Federal Land Bank v. *Crosland*, 261 U. S. 374, 378, 379.

As applied herein, the statute (Labor Law, Sec. 241) operated directly upon that contract.

The contract stipulated: "State or Municipal Building Regulations did not apply to work inside the Government's lot lines" (Deft.'s. Ex. A for Iden.* R. 121, fol. 363, offered, R. 110, 111).

Although the purpose of Labor Law, Section 241, is the promotion of safety in building operations, the method adopted to accomplish that purpose is by regulating the time when, and the manner in which, floors shall be installed in the construction of buildings. Clearly, therefore, that statute is a "building regulation" within the meaning of that term, as used in the contract.

It seems clear that the inclusion of that specification in the contract by the responsible government officers (40 U. S. C. A., Secs. 341, 342) was the result of their determination that *compliance* with such regulations would hinder and impede performance of the work.

Clearly, therefore, the statute in question was applied directly contrary to that *determination* of the administrative officers charged by Congress with the conduct of this governmental activity, and to impose a burden upon, and interfere with, an instrumentality of the Federal Government.

Doubtless it will be urged here, as it was in the courts below, that the imposition of liability upon *appellant* did not interfere with its *work* under the contract. We believe that argument to be unsound. It begs the question. As

* Appendix, p. 29, *post*.

has been shown, appellant's liability is the *result* of its alleged violation of that statute. Had it *complied* therewith, there would have been no liability. However, compliance would have conflicted with its contract with the Government.

It can hardly be supposed that the Government *intended* to subject its contractor to potential civil liability for failure to comply with a regulation which, by its contract, it specifically stated should not apply to its work.

We submit, therefore, that even if it be determined that the building in question was within the territorial jurisdiction of the State, the statute in question, as applied herein, conflicts and interferes with an instrumentality of the United States and is, therefore, repugnant to the Constitution of the United States.

McCulloch v. *Maryland*, 4 Wheat. 316, 436;
Osborn v. *Bank of United States*, 9 Wheat. 738, 867;
Western Union Tel. Co. v. *Texas*, 105 U. S. 460, 465;
Arizona v. *California*, 283 U. S. 423, 451.

D.

The exclusion from evidence of Defendant's Exhibit A for Identification (R. 121, offered, R. 110, 111) was reversible error.

As stated above, that exhibit,* an excerpt from appellant's contract with the United States, contained the following stipulation:

> "State or Municipal Building Regulations do not apply to work inside the Government's lot lines."

Its exclusion "as not binding" (R. 110, fol. 330) was apparently upon the theory that a contract may not relieve a party thereto from the performance of a duty owed by him to a stranger thereto.

That rule, as usually applied, is not questioned. Here, the situation is different. As has been shown,† the contract

* Page 29, *post*.
† Page 19, *ante*.

was an *instrumentality* of the Federal Government and was also evidence of executive *determination* that compliance with the statute (Labor Law, Sec. 241) would burden, hinder and interfere with the performance thereof.

As the execution of this Federal project was entrusted to those officials by Congress* (40 U. S. C. A., Secs. 285, 341, 342), their authority in that connection would seem clear.

> *Maryland Casualty Co.* v. *United States*, 261 U. S. 342, 349.

In *Anderson* v. *Chicago & N. W. R. R. Co.* (162 Neb. 578, 168 N. W. 196), the Supreme Court of Nebraska held that an order of the War Department directing defendant not to fence its right of way in the Fort Robinson Military Reservation, *barred* an action under a state statute imposing such duty. In that case the statute was identical to the one involved in the *McGlinn* case, *supra* (114 U. S. 542), and had been in effect *before* jurisdiction was *ceded* to the United States.

It was there said (at p. 584):

> "The war department has decided that the fencing of the right of way would impair the effectiveness of the territory for the purpose for which the cession was made. * * * It is not for the state or its citizens to interfere with the purpose for which control of the territory was ceded, and, when the defendant was forbidden to erect the fences by that department of the United States government lawfully in control of the reservation, *no other citizen can complain of a non-performance* or hold defendant guilty of a violation of law." (Italics supplied.)

It is submitted, therefore, that the exclusion of that evidence was reversible error.

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* Appendix, page 30, *post*.

In conclusion, we respectfully urge that for all of the reasons set forth above, the judgment appealed from should be reversed.

CLARENCE E. MELLEN,
Counsel for Appellant.

APPENDIX.

Labor Law (Consolidated Laws of New York, Chap. 31, Sec. 241).

"SEC. 241. PROTECTION OF EMPLOYEES ON BUILDING CONSTRUCTION OR DEMOLITION WORK. All contractors and owners, when constructing or demolishing buildings, shall comply with the following requirements:

1. If the floors are to be arched between the beams thereof, or if the floors or filling in between the floors are of fireproof material, the flooring or filling in shall be completed as the building progresses.

2. If the floors are not to be filled in between the beams with brick or other fireproof material, the underflooring shall be laid on each story as the building progresses.

3. If double floors are not to be used, the floor two stories immediately below the story where the work is being performed shall be kept planked over.

4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces seasonably required for proper construction of the iron or steel work, for raising or lowering of material or for stairways and elevator shafts designated by the plans and specifications.

5. If elevators, elevating machines or hod-hoisting apparatus are used in the course of construction, for the purpose of lifting materials, the shafts or openings in each floor shall be inclosed or fenced in on all sides by a barrier of suitable height, except on two sides which may be used for taking off and putting on materials, and those sides shall be guarded by an adjustable barrier not less than three nor more than four feet from the floor and not less than two feet from the edges of such shafts or openings. * * *"

The Constitution of the United States (Art. 1, Sec. 8, Clauses 1, 7, 17 and 18).

"The Congress shall have Power * * * To establish Post Offices and Post Roads; * * * To exercise exclusive Legislation * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings; and

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Decision of Supreme Court, Trial Term (Hon. Harry E. Lewis, Justice), Dated November 30, 1937 (R. 122; Not Officially Reported).

"Sadrakula, as admx., &c. v. James Stewart & Co., Inc., and ano. (corrected)—Action by the plaintiff against the general contractor, James Stewart & Co., Inc., for damages resulting from the death of her husband, an employee of a subcontractor. The proximate cause of the accident which occasioned decedent's death was the failure of the defendant to thoroughly plank over the beams as required by Section 241, subdivision 4 of the Labor Law. The defense of assumption of risk is not maintainable where, as here, the relationship of master and servant did not exist. There was likewise a failure to establish that plaintiff's decedent was guilty of any contributory negligence. I direct judgment in favor of the plaintiff for the sum of $23,125.

LEWIS,
J. S. C."

Decision of Appellate Division, Second Department (R. 131; *Sadrakula* v. *James Stewart Co., Inc.*, 254 N. Y. App. Div. 892).

"Action for damages for the death of plaintiff's decedent as a consequence of a violation by the defendant of Section 241, subdivision 4, Labor Law, in the course of the erection of a Federal post office building.

Judgment for plaintiff unanimously affirmed, with costs. (a) The evidence adequately established that the proximate cause of the decedent's death was defendant's failure to plank over the steel beams in the western area of the 'bay' as required by Section 241, subdivision 4, Labor Law. (b) The labor law provision was in effect at the place of the accident because that statute was enacted prior to the acquisition of the property by the Federal Government. The common law and statutes in effect before the act of cession remain in force until displaced by Congress (Kaufman v. Hopper, 220 N. Y. 184, 187, 115 N. E. 470, and cases cited therein). There has been no action by Congress displacing the Labor Law in respect of this Federal reservation. Such Federal action as has taken place is confirmatory of plaintiff's right to invoke the applicable State statutes (45 Stat. 54, tit. 16, U. S. Code, sec. 457)."

Article 11 of General Municipal Law (Consolidated Laws of New York, Chap. 24, Secs. 210, 211, 212; L. 1909, Chap. 29, Secs. 210, 211, 212).

"*Sec. 210. United States may acquire land in cities.* The United States is hereby authorized to acquire by condemnation, purchase or gift in conformity with the laws of this state, one or more pieces of land not exceeding two acres in extent, in any city or village of this state, for the purpose of erecting and maintaining thereon a public building for the accommodation of post-offices and other governmental offices in any such city or village."

"*Sec. 211. Certified copy of transfer to be filed.* Whenever the United States, by any agent authorized under the hand and seal of any head of an executive department of the government of the United States, shall cause to be filed and recorded in the office of the secretary of this state, certified copies of the record or transfer to the United States of any such pieces of land which had been acquired by the United States for the purposes specified in section two hundred and ten of this article, together with maps and descriptions of such lands by metes and bounds, exclusive jurisdiction, except as provided in section two hundred and twelve, is thereupon ceded to the United States over the lands so described, during the time that the United States shall be or remain the owner thereof."

"*Sec. 212. Jurisdiction of state not affected.* The jurisdiction ceded to the United States as prescribed by this article shall not prevent the execution on the land acquired for the purposes specified in section two hundred and ten of any process civil or criminal, issued under the authority of the state, except as such process might affect the property of the United States thereon."

Article 4 of the State Law (Consolidated Laws of New York, Chap. 57, Secs. 50 to 57, Inclusive; L. 1909, Sec. 50, as Amended by L. 1922, Chap. 14, and Secs. 51 to 57, Inclusive).

"*Sec. 50. Consent of state to purchase of land and record of conveyances.* The consent of the state of New York is hereby given to the purchase by the government of the United States, and under the authority of the same, of any tract, piece or parcel of land from any individual or individuals, bodies politic or corporate within the boundaries of this state, for the purpose of parade or manœuver grounds, aviation fields, navy yards and naval stations, or for the purpose of erecting thereon lighthouses, beacons, light-house

keepers' dwellings, hospitals, sanatoriums, works for improving navigation, post-offices, custom houses, fortifications, or buildings and structures for the storage, manufacture or production of supplies, ordnance, apparatus or equipment of any kind whatsoever for the use of the army or navy, and any other needful buildings and structures, and all deeds, conveyances or other payers relating to the title thereof shall be recorded in the office of the register, if any, or if not in the office of the county clerk, of the county where the said lands are situated."

"*Sec. 51. Proceedings for acquiring title.*" (Detailed methods by which United States may acquire title when unable to agree with owners, or where owners are unknown, etc. Not pertinent herein.)

"*Sec. 52. Governor may execute deed or release.* Whenever the United States, by any agent authorized under the hand and seal of any head of an executive department of the government of the United States, shall cause to be filed and recorded in the office of the secretary of state of New York, certified copies of the record or transfer to the United States of any tracts or parcels of land within this state, which have been acquired by the United States for any of the purposes aforesaid, together with maps or plats and descriptions of such lands by metes and bounds, and a certificate of the attorney-general of the United States that the United States is in possession of said lands and premises for either of the works or purposes aforesaid, under a clear and complete title, the governor of this State is authorized, if he deems it proper, to execute in duplicate, in the name of the state and under its great seal, a deed or release of the state ceding to the United States the jurisdiction of said tracts or parcels of land as hereinafter provided."

"*Sec. 53. Concurrent jurisdiction as to service of process.* The said jurisdiction so ceded shall be upon the express condition that the state of New York shall retain a concurrent jurisdiction with the United States on and over the property and premises so conveyed, so far as that all civil and crim-

inal process, which may issue under the laws or authority of the state of New York, may be executed thereon in the same way and manner as if such jurisdiction had not been ceded, except so far as such process may affect the real or personal property of the United States."

"*Sec. 55. Delivery and filing of deeds and releases.* One of the deeds or releases so executed in duplicate shall be delivered to the duly authorized agent of the United States, and the other deed or release shall be filed and recorded in the office of the secretary of state of New York: and said deed or release shall become valid and effectual only upon such filing and recording in said office."

"*Sec. 56. Statement to be published in session laws.* The secretary of state shall cause to be printed in the session laws of the year succeeding the filing in his office of said deed, a statement of the date of the application of the United States for said deed and a copy of the description of the lands so conveyed or ceded, together with the date of the recording of said deed in the office of the said secretary of state."

"*Sec. 57. Article not to apply to Orange county.* This article shall not apply to the county of Orange."

United States Code, Title 40, Sec. 255 (R. S. [2nd Ed., 1878], Sec. 355).

"**Title to land to be purchased by United States.** No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any customhouse, or other public building, of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. * * *"

(Omitted part not pertinent.)

Defendant's Exhibit A for Identification (R. 124; Excluded, R. 111; Assignment of Errors, Item 6).

Contract between James Stewart & Co., Inc., and the United States of America, Treasury Department, Procurement Division, dated November 9, 1934, referred to in paragraph "Second" of the Amended Complaint, in which said James Stewart & Co., Inc., is described as "the contractor," contained the following provisions, among others:

"21. PROTECTION OF PUBLIC AND PROPERTY.—The contractor shall protect all materials and work, whether incorporated in the building or not, against injury from any cause, and shall provide and maintain all necessary guards, lights, etc., for the protection of the public, and he shall comply with all Municipal ordinances which apply to the use of sidewalks and streets or alleys for building operations, but such ordinances do not apply inside of the lot lines. He shall be held responsible for any damage or injury to persons or property which may occur as a result of his fault or negligence in the prosecution of the work."

"2. PERMITS.—The contractor shall without additional expense to the Government obtain all required licenses, permits, etc. This applies to work outside the lot lines, the use of streets and sidewalks, the protection of public and traffic, connections to utility service lines, etc. State or Municipal Building Regulations do not apply to work inside the Government's lot lines."

40 U. S. C. A. Sections 285, 341, 342.

"§ 285. Buildings under control of Secretary of Treasury. All courthouses, customhouses, post offices, appraiser's stores, barge offices, and other public buildings outside of the District of Columbia and outside of military reservations which have been purchased or erected, or are in course of construction, or which may be erected or purchased out of any appropriation under the control of the Treasury Department, together with the site or sites thereof, are expressly declared to be under the exclusive jurisdiction and control and in the custody of the Secretary of the Treasury, who shall have full power to take possession of and assign and reassign rooms therein to such Federal officials, clerks, and employees as in his judgment and discretion should be furnished with offices or rooms therein. (July 1, 1898, c. 546, § 1, 30 Stat. 614; May 29, 1920, c. 214, § 1, 41 Stat. 654.)

"§ 341. Secretary of Treasury authorized to acquire sites for and construct public buildings. To enable the Secretary of the Treasury to provide suitable accommodations in the District of Columbia for the executive departments, and independent establishments of the Government not under any executive department, and for courthouses, postoffices, immigration stations, customhouses, marine hospitals, quarantine stations, and other public buildings of the classes under the control of the Treasury Department in the States, Territories, and possessions of the United States, he is hereby authorized and directed to acquire, by purchase, condemnation, or otherwise, such sites and additions to sites as he may deem necessary, and to cause to be constructed thereon, and upon lands belonging to the Government conveniently located and available for the purpose (but exclusive of military or naval reservations), adequate and suitable buildings for any of the foregoing purposes, giving preference, where he considers conditions justify such action, to cases where sites for public buildings have prior to May 25, 1926, been acquired or authorized to be acquired, and to enlarge, remodel, and extend existing public buildings under

the control of the Treasury Department, and to purchase buildings, if found to be adequate, adaptable, and suitable for the purposes of this chapter, together with the sites thereof, and to remodel, enlarge, or extend such buildings and provide proper approaches and other necessary improvements to the sites thereof. When a building is about to be constructed on a site acquired prior to May 25, 1926, and such site is found by the Secretary of the Treasury to be unsuitable for its intended purpose, he is hereby further authorized and empowered to acquire a new site in lieu thereof by purchase, condemnation, exchange, or otherwise, and except in case of exchange to dispose of the present site by public sale and to execute the necessary quitclaim deed of conveyance: *Provided, however*, That the Secretary of the Treasury is also authorized to acquire a site for a building for the Supreme Court of the United States: *Provided further*, That aside from land that may be acquired for a site for a building for the Supreme Court of the United States, and for enlarging the site of the Government Printing Office, or erecting a storage warehouse or warehouses, the sum of $50,000,000, hereinafter authorized for projects in the District of Columbia, shall be used exclusively for the purpose of acquiring by purchase, condemnation, or otherwise, south of Pennsylvania Avenue and west of Maryland Avenue, projected in a straight line to Twining Lake, such sites or additions to sites as the Secretary of the Treasury may deem necessary to provide such suitable office accommodations in the District of Columbia as are hereinbefore mentioned, of constructing adequate and suitable buildings for the furnishing of such office accommodations on said sites or additions to sites, or on sites already owned by the Government south of Pennsylvania Avenue and west of Maryland Avenue, as above mentioned, and of providing suitable approaches to said buildings, and beautifying and embellishing their surroundings as nearly in harmony with the plan of Peter Charles L'Enfant as may be practicable. Said buildings shall be so constructed as to combine high standards of architectural beauty and practical utility: *Provided*, That in carrying into effect

the provisions of this chapter, in so far as relates to buildings to be used in whole or in part for post-office purposes, the Secretary of the Treasury, under regulations to be prescribed by him, shall act jointly with the Postmaster General in the selection of towns or cities in which buildings are to be constructed and the selection of sites therein: *Provided further*, That all sketches, plans, and estimates for buildings shall be approved by the Secretary of the Treasury and the heads of the executive departments which are to be located in such building.

"The Secretary of the Treasury is authorized to carry on the construction work herein authorized by contract, or otherwise, as he deems most advantageous to the United States.

"In all cases where the construction of buildings in the District of Columbia, under the provisions of this chapter, requires the utilization, in the opinion of the Secretary of the Treasury, of contiguous squares as sites thereof, authority is hereby given for closing and vacating such portions of streets as lie between such squares and such alleys as intersect such squares, and the portions of such streets and alleys so closed and vacated shall thereupon become parts of such sites. (May 25, 1926, c. 380, § 1, 44 Stat. 630.)

"§ 342. Duties of Office of Supervising Architect; employment of assistance; compensation; expenses. (a) The work of preparing designs and other drawings, estimates, specifications, and awarding of contracts, as well as the supervision of the work authorized under the provisions of this chapter, shall be performed by the Office of the Supervising Architect, Treasury Department, under the direction of the Secretary of the Treasury, except as otherwise provided in this chapter.

"(b) When deemed by him advantageous the Secretary of the Treasury is authorized, in special cases, (1) to procure by contract the floor plans and designs of buildings developed sufficiently to serve as guides for the preparation of working drawings and specifications, or to employ advisory assist-

ance involving design or engineering features, and (2) to employ, to the extent deemed necessary by him in connection with the construction of buildings for the Departments of Commerce and Labor, the architects who were successful in competition heretofore held for a building for the then Department of Commerce and Labor, and to pay reasonable compensation for such services.

"(c) The Secretary of the Treasury is authorized to employ such additional technical, scientific, and clerical assistance in or under the Office of the Supervising Architect, both in the District of Columbia and in the field, as he deems necessary, and to fix such rates of compensation therefor as he deems proper, not, however, in excess of the maximum rates paid for the same or similar service in other departments, such employment to be made in accordance with the civil service laws, rules, and regulations, and to submit to Congress through customary channels, estimates for appropriations for compensation for such personal services, and for travel, subsistence, and other expenses involved in making any investigation or survey of building conditions or in the examination of sites which he may find to be necessary. (May 25, 1926, c. 380, § 2, 44 Stat. 631.)"

Act of February 13, 1925, Chapter 229, Section 1; 43 Stat. 936, 937 (U. S. Code, Title 28, Section 344), Amending Judicial Code, Section 237.

"(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, * * *, of laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ." (Part omitted not pertinent.)

Act of January 31, 1928, Chapter 14; 45 Stat. 54, as Amended by Act of April 26, 1928, Chapter 440; 45 Stat. 466 (28 U. S. C. A. Sections 861-A and 861-B).

"That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Section 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

AUG 1 1939
CHARLES ELMORE CROPLEY
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 251

JAMES STEWART & CO., INC.,

Appellant,

vs.

KATHERINE SADRAKULA, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF NICHOLAS SADRAKULA, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

LEO FIXLER,
Counsel for Appellee.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
Preliminary statement	1
1. There is no Federal question involved	3
2. There is no substantial Federal question involved	5
3. Answering appellant's assignment of errors	11
Appendix	15

Table of Cases Cited.

Etna Life Insurance Co. v. *Dunken*, 266 U. S. 389	11
Alexander v. *Movietonews*, 273 N. Y. 511, 301 U. S. 702	5
Alire v. *U. S.*, 1 Ct. of Claims, 233, rev'd 6 Wall. 573, 18 L. Ed. 947	12
Alward v. *Johnson*, 282 U. S. 509	10
Arlington Hotel v. *Fant*, 278 U. S. 439	6
Atkinson v. *State Tax Commission*, 62 P. (2d) 13, aff'd 303 U. S. 20	4
Barrett v. *Palmer*, 135 N. Y. 336, 162 U. S. 399	6, 7
Bohnhoff v. *Fischer*, 210 N. Y. 172	8
Brinkerhoff-Faris Trust., etc., v. *Hill*, 281 U. S. 673	8, 11
Campbell v. *United States*, 107 U. S. 407	12
Chapin v. *Fye*, 179 U. S. 127	3
Chicago, Rock Island & Pacific R. R. Co. v. *McGlinn*, 114 U. S. 542	6, 7
Coombs v. *Getz*, 285 U. S. 434	8, 11
Currin v. *Wallace*, 59 S. Ct. 379	13
Deming v. *Carlisle Packing Co.*, 226 U. S. 102	14
Drummond v. *Norton*, 156 A. D. 126, aff'd 213 N. Y. 670	8
Fiske v. *Kansas*, 274 U. S. 380	11
Ft. Leavenworth Ry. Co. v. *Lowe*, 114 U. S. 525	4, 6

	Page
Honeyman v. *Hanan*, 300 U. S. 14, appeal dismissed 302 U. S. 375	5
James v. *Dravo Contracting Co.*, 302 U. S. 134	10
Kaufman v. *Hopper*, 220 N. Y. 184	6
Larson v. *South Dakota*, 278 U. S. 429, 73 L. Ed. 441	4
Maryland Cas. Co. v. *United States*, 251 U. S. 342	13
Mellon v. *O'Neill*, 275 U. S. 212; 72 L. Ed. 245	3
Morrill v. *Jones*, 106 U. S. 466	12
Murray v. *Joe Gerrick & Co.*, 291 U. S. 315, 78 L. Ed. 821	6, 9
Milheim v. *Moffat Tunnel, etc.*, 262 U. S. 710	14
Panama Refining Co. v. *Ryan*, 55 S. Ct. 241	12, 13
Price v. *Illinois*, 238 U. S. 446	8, 11
Ralph Sollett, etc., v. *Commonwealth*, 78 L. Ed. 1463	10
Roe v. *Kansas*, 278 U. S. 191	11
Sawyer v. *United States*, 10 F. (2d) 416	13
Schmidt v. *Merchants Dispatch Transportation Co.*, 270 N. Y. 287	9
Seaboard Air Line v. *Watson*, 287 U. S. 86	11
Silas Mason Co. v. *Tax Commission of Washington*, 302 U. S. 186, 82 L. Ed. (adv.) 154, 159	4
Steele v. *Halligan*, 229 F. 1011	7, 9
U. S. v. *George*, 228 U. S. 14	12
U. S. v. *Tishman*, 99 F. (2) 951, certiorari denied, 59 S. Ct. 483	13
Vilas v. *Manilla*, 220 U. S. 345	6
W. U. Tel. Co. v. *Chiles*, 214 U. S. 274	6

Statutes Cited.

Labor Law, Sect. 241 sub. 4	2, 6, 9
State Law, Sec. 50, 52 and 53	3
General Municipal Law, Sect. 210, 211, 212	4
Article I, Sect. 8, U. S. Constitution, Clauses 1, 7, 17, 18	5, 10
Act of Congress of February 1st, 1928, 45 Stat. 54	6, 8
Decedent's Estate Law, Sec. 130	8

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APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Preliminary Statement

Appellee is the widow of one Nicholas Sadrakula, who died on October 24, 1935, as a result of injuries sustained that day when he fell from the first to the basement floor while working as a rigger in connection with the construction of a Post Office Building in the City of New York.

Appellant was the general contractor, under an agreement with the Treasury Department dated November 9, 1934 (R.* 121). Decedent's employer, a sub-contractor, (Ex. "3", R. 118) undertook to install certain hoisting equipment.

The steel construction had been fully completed and decedent was supervising the installation of guide rails in a "bay" designated by the appellant. By a "bay" was meant the area between four upright steel columns, being 30′ long and 20′ wide. The "bay" was divided by two parallel cross girders thus creating three equal panels 30′ long and 6⅔′ wide.

It was within the center panel that the rails had been installed for the purpose of guiding the "bucket" in ascent and descent to various floors in the building.

The actual space reasonably required for the installation of the guide rails and the bucket was less than 60 square inches.

The photographs (Ex. 1 and 2, R. 116, 117) show the guide rails and the bucket within the center panel of the bay.

In looking at the photographs, North is to the left and South to the right. The nearer guide rail was called the "west rail".

Appellant conceded that at no time did it attempt to plank over any part of the bay and the area to the west of the guide rails was unguarded.

The evidence established that Sadrakula fell backwards through this unguarded space. To the absence of the planking required by Section 241 subd. 4 of the Labor Law,[1] his death was attributed. (Decision by Mr. Justice Lewis, R. 122.)

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*All references are to pages of the printed case on appeal in the Court of Appeals, which appellant is filing with the Clerk of this Court.

[1] Appendix, p. 15.

Upon the trial, appellant rested at the end of appellee's proof. The jury was waived and the Court found for appellee. That determination has been unanimously affirmed by the Appellate Division of the New York Supreme Court and the Court of Appeals.

The basis of the present appeal rests upon the contention of appellant, as certified below, that a Federal question was necessarily passed upon.

In answer to all of appellant's contentions, appellee respectfully submits a statement of matter and grounds making against the jurisdiction of the United States Supreme Court as follows:

I

There is no Federal Question Involved.

The jurisdiction of this Honorable Court to entertain this appeal exists only if a Federal question is apparent from the record.

Mellon v. *O'Neill*, 275 U. S. 212, 72 L. Ed. 245.

It cannot be supplied by an assignment of errors.

Chapin v. *Fye*, 179 U. S. 127, 45 L. Ed. 119.

Appellee contends that there is no Federal question involved because although the United States purchased the enclave before decedent met his death, it did not obtain "exclusive jurisdiction" thereof, until several months later. (R. Stipulation pgs. 17 & 18).

By this stipulation (supra) it was agreed that the United States purchased the property in 1931 and filed certified copies of the record or transfer of the property, in the office of the Secretary of State on December 26th, 1935 (R. 17, 18).

Decedent met his death on October 24th, 1935 (R. 18).

Appellant states "exclusive jurisdiction thereof was ceded to the United States by Consolidated Laws, Chapter 57, Section 50, 53 (State Law, Secs. 50, 53)".

We do not know why it omitted Section 52 of the same law because it is only by reason thereof that "exclusive jurisdiction" was ceded. As the enclave in question was also within the confines of the City of New York, Secs. 210, 211 and 212 of the General Municipal Law (Consolidated Laws of 1909, Chap. 29)[2] also apply. Both Sec. 52 of the State Law and Sec. 211 of the General Municipal Law, provides that "exclusive jurisdiction" is ceded by the State to the United States upon the filing of certified copies of the record or transfer with the Secretary of the State of New York.

The stipulation (R. 18) follows the language of Sec. 211 of the General Municipal Law and it appears therefrom that such filing did not take place until two months after decedent's death.

Statutes relinquishing jurisdiction are strictly construed since it is of the greatest importance to both national and state governments.

Larson v. *South Dakota*, 278 U. S. 429, 73 L. Ed. 441.

When land is ceded by a State to the United States, the extent of Federal jurisdiction depends upon the terms of the act of cession.

Atkinson v. *State Tax Commission*, 62 P. (2nd) 13, aff'd. 303 U. S. 20, 82 L. Ed. (adv.) 440.

Silas Mason Co. v. *Tax Commission of Washington*, 302 U. S. 186, 82 L. Ed. (adv.) 154, 159.

Ft. Leavenworth Ry. Co. v. *Lowe*, 114 U. S. 525, 537.

Although appellant omits any discussion of this point, it is well aware of its significance because at page 10 of its brief, under sub. "F." it says:

> "The decisions of the State Courts do not rest upon the ground that exclusive jurisdiction of the enclave

[2] Appendix, p. 15.

had not, in fact, been ceded before the accident and before the execution of appellant's contract with the United States, but are placed entirely upon the ground that the State Statutes continued to apply *after* such cession, because the Congress had not 'displaced' it".

This observation is true as to the determination of the Appellate Division, but is not so as to the decision of the Trial Court (R. 122).

There is but one conclusion however, that can be drawn from the record and that is that the United States did not obtain exclusive jurisdiction over the enclave until after the accident and more than one year after appellant received its contract from the Treasury Department.

There is therefore no Federal question involved authorizing review by this Honorable Court.

II

There is no Substantial Federal Question Involved.

The Court of Appeals did certify that a Federal question was necessarily passed upon by it but that of course is not binding upon this Honorable Court.

Alexander v. *Movietone News*, 273 N. Y. 511; certiorari denied 301 U. S. 702, 81 L. Ed. 1357.

Honeyman v. *Hanan*, 300 U. S. 14, appeal dismissed 302 U. S. 375.

Upon the trial the jury was waived and questions of law and fact were submitted to the Court (R. 114).

Appellant's motion to dismiss was based upon the ground that the provisions of the Labor Law were not applicable to the place of the accident because they were repugnant to Article I, Sec. 8 of the United States Constitution (R. 112 and 113).

The Learned Trial Justice in deciding in appellee's favor stated in part: (R. 122)

"The proximate cause of the accident which occasioned decedent's death was the failure of the defendant to thoroughly plank over the beams as required by Sec. 241, sub. 4 of the Labor Law".[3]

Whether this conclusion was arrived at because the United States did or did not have jurisdiction, does not appear.

It is appellant's contention that the record supports the view that jurisdiction was in the State of New York at the time.

However, from a legal standpoint, it is immaterial whether the State or the United States had jurisdiction because in either event the State Labor Laws were applicable.

Such is the law as established by this Honorable Court and confirmed by the Act of Congress of Feb. 1st, 1928, 45 Stat. 54 (16 U. S. C. A. Sec. 457).[4]

1. *Murray* v. *Joe Gerrick & Co., Inc.*, 291 U. S. 315; 78 L. Ed. 821.
2. *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439.
3. *Vilas* v. *Manilla*, 220 U. S. 345.
4. *Western Union Tel. Co.* v. *Chiles*, 214 U. S. 274.
5. *Barrett* v. *Palmer*, 135 N. Y. 336, aff'd 162 U. S. 399.
6. *Chicago, Rock Island & Pac. R. R. Co.* v. *McGlinn*, 114 U. S. 542, 546.
7. *Ft. Leavenworth Ry. Co.* v. *Lowe*, 114 U. S. 525, 539.

The unanimous affirmance of the Appellate Division of the Supreme Court (R. 131), was likewise unanimously affirmed by the Court of Appeals (220 N. Y. —, 20 N. E. 2d 1015).

The Appellate Division based its determination upon the case of *Kaufman* v. *Hopper*, 220 N. Y. 184. In that case,

[3] Appendix, p. 15.
[4] Appendix, p. 16.

at page 187, the late Mr. Justice Cardozo, writing the opinion for the Court of Appeals stated:

> "The common law and statutes passed before the Act of Cession remain in force in the ceded territory until displaced by Congress (McCarthy *v.* Packard Co., 105 A. D. 436, aff'd on opinion below, 182 N. Y. 555; Barrett *v.* Palmer, 135 N. Y. 336), but later statutes are of no effect. This is now the settled rule. (Farley *v.* Scherno, 208 N. Y. 269; Ft. Leavenworth R. R. Co. *v.* Lowe, 114 U. S. 525, 537; W. U. Tel. Co. *v.* Chiles, 214 U. S. 274.)"

Barrett v. *Palmer*, 135 N. Y. 336, was affirmed by this Court in 162 U. S. 399, upon the authority of the oft cited case of *Chicago, Rock Island & Pacific R. R. Co.* v. *McGlinn*, 114 U. S. 542.

As was done in *Barrett* v. *Palmer* (*supra*), we respectfully quote from the learned opinion of Mr. Justice Field in the *McGlinn* case, at page 546:

> "It is a general rule of public law recognized and acted upon by the United States that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, *i. e.*, the laws which are intended for the protection of private rights, continue in force until abrogated by the new government or sovereign."

The Labor Law clearly falls within this definition. *Steele* v. *Halligan*, 229 Fed. 1011 (Wash.).

It was intended for the protection of employees. It defines the obligations of a general contractor to all workmen engaged in the construction of buildings within the State.

Its violation may be shown as evidence of negligence in an action against a contractor who fails to comply there-

with. Such is the construction which has been placed thereon by the New York State courts.

Drummond v. *Norton*, 156 A. D. 126, aff'd 213 N. Y. 670;
Bohnhoff v. *Fischer*, 210 N. Y. 172.

This Court will not interfere with a State's construction of its own statutes.

Coombs v. *Getz*, 285 U. S. 434;
Price v. *Illinois*, 238 U. S. 446;
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673.

Even if it be assumed that "exclusive jurisdiction" was vested in the United States at the time of the accident the provisions of the State Labor Law would nevertheless apply, since they were in force at the time of the cession and were never displaced by Congress. Therefore no Federal question of substance is involved.

Any doubt about the application of the existing laws of the State to the enclave, was removed by the Act of February 1st, 1928, 45 Stat. 54 (16 U. S. C. A., S. 457).[5]

Appellee's cause of action is derived from the Consolidated Laws of 1920, Chap. 919, Sec. 130 (Decedent's Estate Law, Sec. 130). In so far as it is relevant, it provides:

> "The * * * administrator duly appointed in this State (N. Y.) * * * of a decedent who has left him * * * surviving, a * * * wife * * * may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person, who, or a corporation which, would have been liable to an action in favor of a decedent by reason thereof if death had not ensued * * *."

No question is raised by appellant as to the validity, or application of this statute, for it falls clearly within the con-

[5] Appendix, p. 16.

temiplation of the Act of February 1st, 1928 (*Murray* v. *Joe Gerrick & Co., Inc.*, 291 U. S. 315).

The error assigned is that Sec. 241, sub. 4, of the Labor Law,[6] was erroneously applied. Appellant does not question its validity but rather the propriety of its application to the ceded property over which it claims the United States had "exclusive jurisdiction".

This provision of the Labor Law does not create a cause of action. It prescribes a protective measure, the violation of which constitutes some evidence of negligence, in an action for personal injuries or as in the instant case, an action for wrongful death under Sec. 130 of the Decedent's Estate Law.

Schmidt v. *Merchants Dispatch Transp. Co.*, 270 N. Y. 287.

As such it became part of the law of negligence in existence in the enclave at the time of the cession and continued in force and effect since Congress failed to enact any law to supersede it.

Steele v. *Halligan*, 229 Fed. 1011.

Appellant also contends that as applied in the instant case, the Labor Law imposed a burden upon the work which it was performing for the United States in that the enforcement thereof would constitute an interference with the exercise by the Federal Government of its functions.

That contention, as we see it, can only refer to the requirement of the Labor Law that open steel work be thoroughly planked over (Sec. 241, subd. 4).[7]

Such provision is not directed to the United States, its property or officers. It is not directed to an instrumentality of the government. Appellant is an independent contractor.

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[6] Appendix, p. 15.
[7] Appendix, p. 15.

The provisions of the Labor Law certainly do not restrict the operation or conduct of a post office.

At most, the law prescribes a method of construction which might increase the cost to the contractor, if complied therewith, and so reduce his profit. That it might indirectly increase the cost to the United States is the only possible burden we can see.

That such a contention is without merit was decided in *Alward* v. *Johnson*, 282 U. S. 509, 75 L. Ed. 496. This view was recently approved by this Court in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, wherein Mr. Chief Justice Hughes, in discussing the *Alward* case, said in substance; that the argument that the cost to the Federal Government of the carriage of mails might be increased, did not impress the Court as militating against the law's validity.

The rejection of such contention by the Court below was clearly in accordance with these authorities.

Whether State officers could compel compliance with the Labor Law provisions is not a question before us as we are concerned solely with the civil aspects of the law.

It follows that even if it be assumed that the United States did have "exclusive jurisdiction" over the ceded property, the labor law was nevertheless properly held applicable since in no way was it repugnant to the Federal Constitution. The absence of a substantial Federal question therefore requires a dismissal.

Ralph Sollett & Sons, Construction Co. v. *Commonwealth of Virginia*, appeal dismissed, April 2, 1934. 292 U. S. 599; 78 L. Ed. 1463, for want of a substantial Federal question. (As in the instant case the appellant therein urged that the State statute was of no effect because it sought to extend the state's jurisdiction over property where the Federal government had exclusive legislative jurisdiction, pursuant to Article 1, Sec. 8, Clause 17, U. S. Constitution.)

Seaboard Air Line R. Co. v. *Watson*, 287 U. S. 86, 77 L. Ed. 180.

Roe v. *Kansas*, 278 U. S. 191, 73 L. Ed. 259.

III.

Answering Appellant's Assignment of Errors.

In discussing the jurisdiction of this Honorable Court to hear this appeal, we have answered appellant's assignment of errors numbered 1, 2, and 3 since they concern themselves with the application of the Labor Law to the enclave where decedent met his death.

In item 4, appellant contends that the State Court erred in holding that appellant violated Section 241, sub. 4 of the Labor Law. That issue was one of fact for the trial court (the jury having been waived) and this Honorable Court will not review the weight of evidence.

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389, 394, 69 L. Ed. 342, 347.

Fiske v. *Kansas*. 274 U. S. 380, 385, 71 L. Ed. 1108, 1110.

As to item 5, appellant charges error in the holding that decedent's death was caused by a violation of Sec. 241, sub. 4 of the Labor Law.

This, too, was one of the issues of fact for the trial court and involved the construction and interpretation of the section.

As we have stated above, this Honorable Court will not interfere with a State Court's construction of its own statute.

Coombs v. *Getz*, 285 U. S. 434.

Price v. *Illinois*, 238 U. S. 446.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 680, 74 L. Ed. 1107.

Its item "6" concerns the exclusion from evidence of its Exhibit "A" for identification, part of its contract with the Treasury Department (R. 121).

Appellant contends that by this Contract the Treasury Department relieved it from complying with the Labor Law provisions.

Under the Constitution, Article I, Section 8, Clause 1, 7, 17, 18 only Congress is vested with the power to enact laws. Admittedly its only relevant enactment was that of February 1, 1928 (16 U. S. C. A. 457), 45 Stat. 54.

To accept appellant's argument, would mean that the Treasury Department by contract or regulation could remove the legal effect of an Act of Congress.

The executive departments are neither judicial nor quasi-judicial in character and their actions, while binding on each other, are not binding on the Courts.

Alire v. *U. S.*, 1 Ct. of Claims, 233, reversed on other grounds, *U. S.* v. *Alire*, 6 Wall. 573, 18 L. Ed. 947.

The power conferred upon executive heads of such departments, is administrative, not legislative.

U. S. v. *George*, 228 U. S. 14, 57 L. Ed. 712.

Regulations by an executive, must be consistent with law. They may not be extended so as to alter, amend or defeat a law already enacted by Congress. Where rights, duties and obligations are defined by statute, they cannot be taken away or abridged by the regulations of an executive department.

Campbell v. *U. S.*, 107 U. S. 407, 27 L. Ed. 592.
Morrill v. *Jones*, 106 U. S. 466, 27 L. Ed. 267.

The legislative power vested in Congress cannot be abdicated or transferred to others.

Panama Refining Co. v. *Ryan*, 55 S. Ct. 241.

U. S. v. *Tishman*, 99 F. (2d) 951, certiorari denied 59 S. Ct. 485.

Curran v. *Wallace*, 59 S. Ct. 379.

The Treasury Department was without authority to grant such immunity to appellant, even if it intended to do so.

Panama Refining Co. v. *Ryan*, 55 S. Ct. 241.

Sawyer v. *U. S.*, 10 F. (2d) 416, 420.

Particularly is this true when the contract or regulation is in conflict with express statutory provision.

Maryland Casualty Co. v. *U. S.*, 251 U. S. 342, 349.

Besides the fact that decedent was not bound by a contract to which he was not a party, it follows from the foregoing that the Treasury Department was without authority to grant any immunity to appellant from the provisions of the Labor Law.

Even if it were so empowered there is nothing contained in the contract from which it can reasonably be said it intended to do so.

The proffered sections insofar as relevant are:

SEC. 21. Protection of Public and Property (R. 121):

> "The contractor shall * * * comply with all Municipal ordinances which apply to the use of sidewalks and streets or alleys for building operations, but such ordinances do not apply inside of the lot lines. He shall be held responsible for any damage or injury to persons or property which may occur as a result of his fault or negligence in the prosecution of the work."

SEC. 22. Permits:

> "The contractor shall without additional expense to the Government obtain all required licenses, permits, etc. This applies to work outside the lot lines, the use of streets and sidewalks, the protection of public and

traffic, connections to utility service lines, etc. State or Municipal Building Regulations do not apply to work inside the Government's lot lines."

A reasonable interpretation of Sec. 21 is that those Municipal Ordinances which applied to the use of sidewalks and streets or alleys for building operations, were not to apply inside of the lot lines.

Sec. 22, as its heading indicates, refers to permit requirements outside the lot lines in the use of streets and sidewalks, etc. State or Municipal Building regulations requiring permits inside the lot lines were referred to and not the Labor Law provisions.

It is thus evident that not only was the Treasury Department without power to grant immunity to appellant from the Labor Law provisions but in fact, it did not do so.

Appellee concludes by respectfully urging that because of all the foregoing, this appeal be dismissed and the judgment of the Court below be affirmed.

Deming v. *Carlisle Packing Co.*, 226 U. S. 102, 57 L. Ed. 140.

Milheim v. *Moffat Tunnel Imp. Dist.*, 262 U. S. 710, 67 L. Ed. 1194.

Leo Fixler,
Counsel for Appellee.

APPENDIX.

LABOR LAW OF THE STATE OF NEW YORK, Section 241, subdivision 4 (Consolidated Laws of New York, Chapter 31, Section 241).

"PROTECTION OF EMPLOYEES ON BUILDING CONSTRUCTION OR DEMOLITION WORK. All contractors and owners, when constructing or demolishing buildings, shall comply with the following requirements: * * *

4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces reasonably required for proper construction of the iron or steel work, for raising or lowering of material or for stairways and elevator shafts designated by the plans and specifications."

GENERAL MUNICIPAL LAW OF THE STATE OF NEW YORK, Section 211 (Consolidated Laws of 1909, Chapter 29).

"Section 211. CERTIFIED COPY OF TRANSFER TO BE FILED. Whenever the United States, by any agent authorized under the hand and seal of any head of an executive department of the government of the United States, shall cause to be filed and recorded in the office of the secretary of state of this state, certified copies of the record or transfer to the United States of any such pieces of land which had been acquired by the United States for the purposes specified in section two hundred and ten of this article, together with maps and descriptions of such lands by metes and bounds, exclusive jurisdiction, except as provided in section two hundred and twelve, is thereupon ceded to the United States over the lands so described, during the time that the United States shall be or remain the owner thereof".

ACT OF CONGRESS of FEBRUARY 1st, 1928, 45 STAT. 54 (16 U. S. C. A., Section 457).

"*Action for death or personal injury within national park or other place under jurisdiction of United States; application of state law.* In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any state, such right of action shall exist as though the place were under the jurisdiction of the state within whose exterior boundaries such place may be; * * *."

FILED
JAN 11 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939

No. 251

JAMES STEWART & CO., INC.,

Appellant,

—*against*—

KATHERINE SADRAKULA, as Administratrix of the Goods, Chattels and Credits which were of NICHOLAS SADRAKULA, Deceased,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLEE'S BRIEF

LEO FIXLER,
Counsel for Appellee.

INDEX

SUBJECT INDEX

	PAGE
1. Preliminary Statement	1
2. Point One:	5
The United States Supreme Court is without jurisdiction.	
3. Point Two:	18
No Federal question of substance is involved.	
4. Point Three:	27
No Federal question of substance is presented by the contention that (assignment of error #6) the trial Court erred in excluding Defendant's Exhibit "A" for identification.	

TABLE OF CASES AND AUTHORITIES

CASES

Alexander v. Movietonews, 301 U. S. 702	17
Alward v. Johnson, 282 U. S. 509	24
Anderson v. Chicago, 162 Neb. 578, 168 N. W. 196	34
Arlington v. Fant, 278 U. S. 439	10, 19, 21
Atkinson v. State Tax, 303 U. S. 20	9
Bacon & Sons v. Martin, 305 U. S. 380	3
Baltimore Ship Bldg. & Dry Dock Co. v. Baltimore, 195 U. S. 375	23
Barrett v. Palmer, 135 N. Y. 336	19
Bradford Elet. Co. v. Clapper, 286 U. S. 145	26

PAGE

Campbell v. United States, 107 U. S. 407 31
Casement v. Brown, 148 U. S. 615 34
Casey v. Bryce, 55 So. 211, 173 Ala. 453 6
Chicago, Rock Is. & Pa. R. v. McGlinn, 114 U. S. 542 ..... 18, 21, 26, 33, 34
City of New York v. Central Savings Bank, 306 U. S. 661 16
Collins v. Yosemite Park, 304 U. S. 518 ..... 9, 11
Curran v. Wallace, 306 U. S. 1 31

Farley v. Scherno, 208 N. Y. 269 19
Fidelity & Deposit Co. v. Penn., 240 U. S. 319 24
Ft. Leavenworth Ry Co. v. Lowe, 114 U. S. 525 .... 10, 19, 21
Fox Film Corp. v. Muller, 296 U. S. 207 16

General Construction Co. v. Fischer, 295 U. S. 715 23
Gromer v. Standard Dredging, 224 U. S. 362 24
Group No. 1 Oil Corp. v. Bass, 283 U. S. 279 35

Herbert v. Louisiana, 272 U. S. 312 3
Honeyman v. Hanan, 300 U. S. 14 ..... 15, 17

James v. Dravo Construction Co., 302 U. S. 134 .. 9, 10, 21, 24

Kaufman v. Hopper, 220 N. Y. 184 ..... 16, 18, 19, 26

Live Oak Water Users Ass'n v. RR Comm. of Cal., 296 U. S. 354 16

	PAGE
McCarthy v. Packard Co., 105 App. Div. 436, affd, 182 N. Y. 555	19
Maryland Cas. Co. v. U. S., 251 U. S. 342	32
Metcalf & Eddy v. Mitchel, 269 U. S. 514	24, 34
Morrell v. Jones, 106 U. S. 466	31
Murray v. Joe Gerrick & Co., 291 U. S. 315	9, 11, 19, 20, 21, 22, 25, 30
Palmer v. Barrett, 162 U. S. 399	19, 21
Panama Refining Co. v. Ryan, 293 U. S. 388	31, 32
Patterson v. State of Alabama, 294 U. S. 600	28
Pennington v. Gibson, 14 U. S. (L. ed) 847	7
People of State of N. Y. v. Vendome Service Inc., 12 N. Y. S. (2nd) 183 (not officially reported)	12
Portland R.R. & L. & P. Co. v. R.R. Comm., 229 U. S. 397	3
Purcell v. N. Y. Central R.R., 296 U. S. 545	17
Ralph Sollett & Comm. of Va., 292 U. S. 599	22, 23
Ryan v. State, 302 U. S. 186	21
Silas Mason Co. v. Tax Comm. of Wash., 302 U. S. 186	9, 10, 21
So. West Bell Tel. Co. v. State of Oklahoma, [illegible]3 U. S. 206	15
Skelly v. N. Y. El. R.R. Co., 7 Misc. 88, affd, 148 N. Y. 747	6
State v. Gramelspacher, 126 Ind. 398, 26 N. E. 81	7
Steele v. Halligan, 229 F. 1011	18
Surpless Trading v. Cooke, 281 U. S. 647	10

PAGE

Thompson v. Union Pac. Ry. Co., 9 Wall 579 24
Trinity Farms Construction Co. v. Grosjean, 291 U. S. 466 ..... 24, 34

United States v. George, 228 U. S. 415 31
United States v. Urzuetta, 281 U. S. 138 ..... 10, 19, 21

Vilas v. Manilla, 220 U. S. 345 ..... 19, 21, 33

Ward v. Board of Co. Comm., 253 U. S. 17 16
Western Union Tel. Co. v. Chiles, 214 U. S. 274 .. 19, 21
Whitney v. California, 274 U. S. 357 3
Williams v. Arlington Hotel, 22 F. (2nd) 669 21

Prior Decisions of Case on Appeal

Sadrakula v. James Stewart & Co. (Appellant's Appendix page 24).
Sadrakula v. James Stewart & Co., 254 N. Y. App. Div. 892 (Appellant's Appendix page 25).
Sadrakula v. James Stewart & Co., 280 N. Y. (Adv. #1) 157, no opinion, Record 133.
Sadrakula v. James Stewart & Co., Amend. of Remittitur 4/21/39 Record 134.

STATUTES

Act of June 25, 1936, 49 Stat. 1938, Title 40, U. S. Code Section 290 (Appendix, page 36) 25, 30
Act of February 1, 1928, 45 Stat. 54 (16 U. S. C. A., Section 457) (Appendix, page 38) 17, 19, 22, 25, 26, 30, 32

	PAGE
Constitution of the United States, Article I, Section 8, Cl. 17 (Appellant's appendix, page 24) ..	9, 10, 13, 20, 23, 31
40 U. S. C. A., Section 255 (Appellant's appendix, page 28)	14
Decedent Estate Law of New York, Section 130 (Appendix, page 37)	21, 26
General Municipal Law of New York, Sections 210, 211, 212 (Appellant's appendix, page 25)	5-13 inc.
Labor Law of New York, Section 241, Subdivision 4 (Appellant's appendix, page 23)	16, 17, 18, 20, 21, 22, 23, 25, 26, 27
New York State Law, Sections 50 to 55, inclusive (Appellant's appendix, page 26)	5-13 inc.
N. Y. State, Penal Law, Section 1275	30

OTHER AUTHORITIES

Congressional Record, Volume 69, Part 2, page 678, 1293	22
10 Op. Atty. Gen. 34 (1861)	12
38 Op. Atty. Gen. 341 (1935)	12, 21
36 Op. Atty. Gen. 86 (1929)	11

Supreme Court of the United States

OCTOBER TERM, 1939

JAMES STEWART & CO., INC.,

Appellant,

—against—

KATHERINE SADRAKULA, as Administratrix of the Goods, Chattels and Credits which were of NICHOLAS SADRAKULA, Deceased.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLEE'S BRIEF

Preliminary Statement.

Appellee is the widow of one, Nicholas Sadrakula, who died on October 24th, 1935 as a result of injuries sustained by him that day while employed as a rigger by the United Hoisting Co., Inc. in connection with the construction of a post office building in the City of New York.

Appellant, a corporation organized under the laws of the State of New York, as general contractor under an agreement with the Treasury Department of the United States, undertook to construct this building and the United Hoisting Co., Inc. was acting as subcontractor for the installation of certain hoisting equipment (plaintiff's Exhibit 3, R. 118, 119, 120).

The complaint (R. 5) charged appellant with negligence in failing to comply with the provisions of the New York State Labor Law*. The answer (R. 8) generally denied the allegations of the complaint and alleged the contributory negligence of the decedent as a separate defense.

At the trial appellant rested at the close of respondent's proof (R. 111). The jury was waived and all questions of fact and law were submitted to the Court (R. 114).

Throughout this litigation appellant conceded that it did not "plank over" the "bay" at which decedent was working on the day of his death but sought to escape liability by claiming that the provisions of the Labor Law were inapplicable because the property where the accident occurred was under the exclusive jurisdiction of the Federal Government (R. 99).

The learned trial Justice decided (R. 122) that "the proximate cause of the accident which occasioned decedent's death was the failure of defendant to thoroughly plank over the beams as required by Section 241, Subdivision 4, of the Labor Law".

Upon appeal, the New York Appellate Division (Second Department) unanimously affirmed, stating in part:

> "The evidence adequately established that the proximate cause of the decedent's death was defendant's failure to plank over the steel beams in the western area of the 'bay' as required by Section 241, Subdivision 4 of the Labor Law" (R. 131).

The Court of Appeals unanimously affirmed the determination of the Appellate Division without opinion (R. 133, 134).

These determinations obviate the necessity of restating the facts and appellant has wisely abandoned the errors assigned numbered 4 and 5 since they concern themselves with the

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* Appellant's Appendix, p. 23.

facts and the construction of the State Labor Law, neither question being reviewable by this Honorable Court.

Herbert v. *Louisiana*, 272 U. S. 312;
Bacon & Sons v. *Martin*, 305 U. S. 380;
Portland R. R. & L. & P. Co. v. *R. R. Comm.*, 229 U. S. 397;
Whitney v. *Peo. of State of Cal.*, 274 U. S. 357.

Appellant's application to amend the remittitur was granted and the Court of Appeals on April 21, 1939 said:

"A question under the Federal Constitution was presented and necessarily passed upon by this Court. The appellant's contention that Section 241, Subdivision 4, of the Labor Law of the State of New York * * * in so far as the said law is construed to apply to the construction and erection of a post office building pursuant to a contract with the Treasury Department of the United States, upon land within the exterior boundaries of the State of New York but which is within the exclusive jurisdiction of the United States under Article I, Section 8, Clause 17 of the Constitution of the United States, is repugnant to the Constitution and Laws of the United States in that it offends Article I, Section 8 of the Constitution of the United States and Title 40, U. S. Code, Sections 285, 341 and 342 * * * and is invalid when so applied.

This Court held that the aforesaid Labor Law of the State of New York is valid and not repugnant to any provision of the Constitution of the United States" (R. 134, 135).

If this Honorable Court decides to hear this cause, then review should be limited to the precise Federal question

raised by the appellant in the trial Court, to wit (R. 98, 99): "That Section 241 of the Labor Law of the State of New York has no application, for the reason that the place of the accident, both the building under construction and the land upon which it was being constructed, were within the exclusive jurisdiction of the United States by virtue of the United States Constitution, Article I, Section 8, Clause 17*; that under the evidence, exclusive jurisdiction over the place of the accident had been ceded to the United States more than about four years prior to accident, and that for that reason no statute regulating the construction of the building, such as the Labor Law here, would apply."

And again, at page 112, folio 336, after resting at the end of appellee's case, "I renew the motion for the direction of a verdict in favor of defendant on the specific ground that Section 241, Subdivision 4 of the Labor Law is not applicable to the place of the accident and that application thereof to the place of the accident is in violation of Article I, Section 8 of the United States Constitution."

In the transcript of the record (R. 142), in addition to the specific Federal question referred to, appellant added as an assignment of error, without authority, that the application of the Labor Law violated U. S. Code, Title 40, Sections 285, 341, 342 (assignment #3).

Since decision upon appellee's motion to dismiss this appeal has been postponed until oral argument, we respectfully refer to that question in our Point I.

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* Appellant's Brief, Appendix p. 24.

POINT I.

This Court is without jurisdiction to hear this appeal because it affirmatively appears from the record that at the time of the accident the United States had not accepted exclusive jurisdiction. There is therefore no Federal question involved.

Prior to the trial of this case, and on November 8th, 1937 (R. 16), in order to save time and expense in procuring certified copies of records filed by the United States in the office of the Secretary of the State, the parties entered into a written stipulation, dated November 1, 1937, because obviously these facts were indisputable (R. 17, 18).

Before preparing that stipulation, appellee wrote to the Secretary of the State of New York to ascertain the exact information to be incorporated in that stipulation. On October 26, 1937, a communication was received from that office in which it was stated that jurisdiction was acquired by the United States under the provision of Section 211* of the General Municipal Law and that the documents listed therein were filed thereunder with the Secretary of State on December 26, 1935.

Not only was this information checked by counsel of record for appellant, but on November 1, 1937 the stipulation (R. 17, 18) was prepared, following the exact language of Section 211 of the General Municipal Law. Why appellant now asserts that the provisions of the State Law apply rather than those of Section 211* of the General Municipal Law, we do not understand, but it is obvious that it would

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* Appellant's Brief, Appendix p. 26.

never have signed the stipulation as it exists if such assertion had any merit.

We assume that counsel in writing his brief at this late date, overlooked these facts as well as others which we propose to bring to his attention.

It is asserted that "as there is no evidence that the land herein involved is not over two acres in area, the General Municipal Law does not apply. Hence, the State Law which contains no such limitation (Section 50)* is alone applicable" (appellant's brief, p. 10). But counsel again overlooks the language of the stipulation (R. 18) which describes the land as bounded "on the North by Barclay Street, on the East by Church Street, on the South by Vesey Street and on the West by West Broadway". This stipulation was before the Supreme Court which presides in the City of New York and as part of the evidence before it, it was privileged to take judicial notice of the size of this plot and appellant would not have there asserted the frivolous argument that there is no evidence that the land comprised less than two acres.

Skelly v. *N. Y. El. R. R.*, 7 Misc. 88, aff'd, 148 N. Y. 747.

In this stipulation it appears that the United States obtained title by private purchase of the plots within this one square block area in New York County. Deeds thereto were on file in the office of the Register of that County.

State Courts must take judicial notice of matters of public record and the facts disclosed by such record are conclusive.

Casey v. *Bryce*, 55 So. 211, 173 Ala. 453.

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* Appellant's Brief, Appendix p. 26.

This rule not only covers the information as to the size of the "enclave" but also the public records and their contents in the office of the Secretary of State that filing of the "Title Papers" as expressed in the stipulation, was made pursuant to Section 211 of the General Municipal Law.

It is strange that appellant waits until this late date to give the stipulation an unwarranted interpretation.

Since these matters were questions of fact for the trial Court and subject to its judicial notice, they are likewise matters to be judicially noticed by this Court.

"A higher Court on appeal will take judicial cognizance of any matter of which the Court of original jurisdiction might take notice" 15 R. C. L. 1063, Section 6 (Citing *Pennington v. Gibson*, 16 How. 65, 14 U. S. (L. Ed.) 847).

Appellant is also in error in stating that "appellee did not question that the United States had exclusive jurisdiction" (appellant's brief, p. 8). That point was raised in a trial memorandum submitted to the trial Court and throughout subsequent proceedings appellee consistently contended that no Federal question was involved.

Appellant may contend that the records of the Secretary of State are not part of the transcript, and in this it would be technically correct but for the fact that the acts of the Treasury Department in filing documents in pursuance of law, and the contents thereof, are judicially known by the Courts of the State as well as this Court sitting as an Appellate Tribunal.

State v. *Gramelspacher*, 126 Ind. 398, 26 N. E. 81, 15 R. C. L. 1063, Section 6.

We next consider appellant's contention that jurisdiction was transferred "*proprio vigore*" by virtue of the Federal Constitution and not through the consent statutes of the State.

The United States acquired title to this property, wholly within the City of New York, by purchase at private sale in 1931, as a site for a new post office and office building.

At the time there were two distinct State acts under which exclusive jurisdiction could be transferred to the United States. State Law, Sections 52 to 55 inclusive,* and General Municipal Law, Sections 211, 212,† Under the State Law (Article 4, Consolidated Laws of New York, Chapter 57, as amended), New York State consented to such purchase under Section 50.* Exclusive jurisdiction was available to the United States under Section 52 upon:

(a) filing and recording of certified copies of the record or transfer together with maps and plans and a certificate from the United States Attorney General that title was clear; and

(b) the Governor was then authorized to execute a deed or release in duplicate ceding jurisdiction to the United States if the latter requested same.

Under Section 55, one of the deeds or releases must be delivered to the agent of the United States, the other filed and recorded in the office of the Secretary of State of New York and "said" deed or release shall become valid and effective only upon such filing and recording in said office."

Admittedly, no certificate, as provided for in the State Law, Section 55, was ever issued by the Governor and no attempt was made by the United States to otherwise comply with its provisions.

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* Appellant's Brief, Appendix p. 26.

† Appellant's Brief, Appendix p. 25.

If, as appellant contends, the State Law applied, even then only consent to the purchase was effective under Section 50, since nothing was done by the United States to obtain exclusive jurisdiction as prescribed by Sections 52 to 55 inclusive and therefore jurisdiction to the present day would remain with the State of New York. However, this absurd situation does not exist because the United States not only obtained consent under Section 210 of the General Municipal Law, but also accepted exclusive jurisdiction by complying with Section 211 on December 26, 1935 and the language of the stipulation (R. 17, 18) precludes any other conclusion.

Decedent met his death on October 24, 1935 as a result of appellant's negligence on that day in failing to comply with the State Labor Law.

Since exclusive jurisdiction contemplated by the New York State consent statutes had not vested in the United States on October 24, 1935, and in fact not until December 26, 1935, there is no Federal question involved and therefore this Court is without jurisdiction to hear this appeal.

In an endeavor to overcome this irrefutable conclusion, appellant urges as it did below, that by virtue of Article I, Section 8, Clause 17 of the Federal Constitution, exclusive jurisdiction over the place of the accident had been ceded to the United States about four years prior thereto (R. 99). This identical contention was rejected by this Honorable Court in the very recent cases of:

James v. *Dravo*, 302 U. S. 134;
Murray v. *Joe Gerrick & Co.*, 291 U. S. 315;
Silas Mason Co. v. *Tax Comm. of Wash.*, 302 U. S. 186;
Atkinson v. *State Tax*, 303 U. S. 20;
Collins v. *Yosemite Park*, 304 U. S. 518.

In the *James* case it was also urged that exclusive jurisdiction vested in the United States by virtue of Clause 17 of

the Federal Constitution and not under the consent statute of the State. Mr. Chief Justice Hughes in delivering the opinion of the Court pointed out that Clause 17 contained "no express stipulation that the consent of the State must be without reservation" and there was no reason "why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases."

In the *Silas Mason Co.* case, the appellant contended that exclusive jurisdiction as to lands purchased at private sale by the United States within the State of Washington, vested "*ipso facto*" in the Federal Government by the operation of Clause 17, Section 8, Article I of the Federal Constitution. Again rejecting such contention, this Court said at page 197:

> "It must appear that the State, by consent or cession, has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise."

Citing:

> *Surpless Trading* v. *Cooke*, 281 U. S. 647;
> *James* v. *Dravo*, 302 U. S. 134;
> *Ft. Leavenworth Ry Co.* v. *Lowe*, 114 U. S. 525;
> *Arlington* v. *Fant*, 278 U. S. 439;
> *United States* v. *Unzuetta*, 281 U. S. 138.

In the *Atkinson* case, the principles set forth in the *James* case and the *Silas Mason* case were reaffirmed. At page 23 this Court said:

> "In Silas Mason v. Tax Comm. * * * we said that as a transfer of exclusive jurisdiction rests upon a grant

by the State, it follows in accordance with familiar principles applicable to grants, that the grant may be accepted or declined."

In *Collins* v. *Yosemite Park*, 304 U. S. 518, at page 528, Mr. Justice Reed stated:

"Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. These arrangements the Courts will recognize and respect."

In *Murray* v. *Joe Gerrick & Co.*, 291 U. S. 315, Mr. Justice Roberts stated for the Court:

"After the effective date of the State's cession the jurisdiction of the Federal Government was exclusive (Ft. Leavenworth Ry Co. v. Lowe, 114 U. S. 525; United States v. Unzuetta, 281 U. S. 138), and laws subsequently enacted by the State were ineffective in the Navy Yard."

The validity of the New York State consent statutes is not questioned by appellant. There can be no doubt, then, from the foregoing principles enunciated by this Court, but that the effective date of the cession of jurisdiction was not until December 26, 1935.

In construing these consent statutes of New York, the United States Attorney General said (1929, 36 Op. Atty. Gen. 86):

"New York Laws 1896, Chapter 391 and New York Laws 1899, Chapter 242 as they have been respectively amended, express the consent of the legislature of the State of New York to the acquisition of land by the United States within their respective limitations."

"The Act of 1899, Chapter 242, should be complied with in the matter of cities not exceeding two acres in extent for post office and other governmental offices in cities and villages as has been done in the past."

The Act of 1899, Chapter 242 (General Municipal Law, Sections 210, 211, 212) is the Act under which the United States filed its "Title Papers" on December 26, 1935.

As early as 1861, the Attorney General said (10 Op. Atty. Gen. 34) that if the United States failed to obtain consent, it tied its own hands just as where a State withholds its consent to a purchase already made.

In 1935, the Attorney General stated the prevailing rule when he said that to transfer exclusive political jurisdiction and dominion contemplated by Article I, Section 8, Clause 17, over land acquired by the Federal Government, the State in which it is situated must either consent to acquisition or legislatively cede such jurisdiction (38 Op. Atty. Gen. 341).

From the foregoing we have therefore the unassailable conclusion that while exclusive jurisdiction was available to the United States by mere compliance with the provisions of the State consent statutes, acceptance thereof was postponed until December 26, 1935 for some reason best known to the Federal Government.

The attitude of the New York State Courts with respect to the meaning and effect of its consent statutes was recently expressed in a local Magistrate's Court and we refer thereto not as authority but rather as a sound application of the rules as laid down by this Honorable Court.

The case is *People* v. *Vendome Service, Inc.*, 12 N. Y. Supp. (2nd) 183, not officially reported. There, as here, although the New York consent statutes were in force and exclusive jurisdiction available to the United States, no application was made therefor by the United States nor was any effort

made to comply with the law's requirements. Mr. Justice Thomas A. Aurelio stated:

> "This not having been done, the rule to be applied in such cases is laid down in the leading case on the subject, Ft. Leavenworth Ry Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264, wherein Mr. Justice Field said 'the consent of the State to the purchase of lands within them for special purposes named, is, however, essential under the Constitution, to the transfer to the general government with the title of political jurisdiction and dominion.' Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor."

While there may be doubt in appellant's mind about the power of the State to impose restrictions upon the manner and extent of jurisdiction being transferred, there is none in ours because that question was resolved with finality by this Court in the recent cases referred to herein, *supra*, and it is now the settled rule that the extent of jurisdiction transferable is governed by the State statutes and not by the United States Constitution, Clause 17, Art. I.

Hence, on the day of this accident, the United States had not obtained jurisdiction and there is therefore no Federal question involved reviewable by this Honorable Court.

In view of these legal principles, appellant's assertion that the General Municipal Law does not apply because of the lack of evidence that not more than two acres were involved, would leave the United States in the sorry position that it never obtained jurisdiction under either Act since it never complied with the State Law and its attempted compliance with the General Municipal Law became ineffec-

tual because jurisdiction thereunder was transferable when only two acres within a City were involved.

We, however, take the reasonable view, supported by the stipulation and the presumption that the Acts of the Federal Government are legal, to wit: that the United States obtained exclusive jurisdiction by complying with the applicable provisions of the General Municipal Law on December 26, 1935.

Even though, as we have shown, the provisions of the State Law were inapplicable, we would like to correct appellant's interpretation thereof. The Act does not give the Governor discretionary power to nullify the consent granted by Section 50, as appellant would have us believe. The consent provided for therein is absolute and complete. With respect to the transfer of jurisdiction, however, under Section 52, the Governor is authorized, if he deems it proper, to execute "a deed or release of the State, ceding to the United States the jurisdiction" over said land. Only to that extent is the Governor clothed with discretion and he is not as appellant contends, with power to "nullify" the consent under Section 50.

Appellant advances the contention that since U. S. Code, Title 40, Section 255, prohibits the expenditure of any public money until State consent is procured, acceptance of jurisdiction must be presumed by the expenditure in the instant case.

But appellant forgets that consent was complete (General Municipal Law, Section 210, or State Law, Section 50) and exclusive jurisdiction available. That the United States delayed its acceptance of exclusive jurisdiction until December 26, 1935, is no concern of appellant's and it is reasonable to say that the Federal Government had a definite reason therefor and we cannot presume that the acts of the Government were illegal.

The United States, therefore, did not obtain jurisdiction over this building until after the date of the accident and this Court is without jurisdiction to hear this appeal.

Appellee next asserts as ground for dismissal that the decision of the State Court rests upon non-Federal ground which independently and adequately supports the judgment of the trial Court not withstanding the certification of a Federal question by the State Court of Appeals.

In *Southwestern Bell Tel. Co. v. State of Oklahoma* (1938), 303 U. S. 206, 82 L. Ed. 751, 58 Sup. Ct. 528, in dismissing an appeal from the State of Oklahoma, this Court stated that it had no jurisdiction to review a State Court decision unless it appeared affirmatively from the record that not only was a Federal question presented for decision to the highest Court of the State having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause; that the Federal question was actually decided or that judgment as rendered could not have been given without deciding it.

In *Honeyman v. Hanan* (N. Y. 1937), 300 U. S. 14, 57 S. Ct. 350, 81 L. Ed. 476, it was said:

> "A certificate or statement by a State Court that a Federal question has been presented to it and necessarily passed upon is not controlling and cannot avail to foreclose inquiry which the United States Supreme Court must make in deciding whether it has jurisdiction or to impart in the record a Federal question which otherwise is not thereby presented." (Appeal dismissed, 302 U. S. 375.)

Does this record meet those requirements? Appellee thinks not and asserts that no Federal question of substance is presented.

The learned trial Justice held:

"The proximate cause of the accident which occasioned decedent's death was the failure of the defendant to thoroughly plank over the beams as required by Section 241, Subdivision 4, of the Labor Law."

The only possible Federal question which could properly have been before the Court was, as stated by appellant (R. 99), that the Labor Law was inapplicable as four years before jurisdiction had been ceded by New York State to the Federal Government.

The decision of the trial Justice does not purport to decide a Federal question.

Obviously, if the United States had not accepted exclusive jurisdiction up to October 24, 1935, no Federal question was involved and the denial of appellant's motion to dismiss in the trial Court supports the conclusion that the judgment rests on adequate, independent, non-Federal ground.

Ward v. *Board of Co. Comm.*, 253 U. S. 17;
Live Oak Water Users Ass'n v. *R. R. Comm. of Cal.*, 296 U. S. 354;
Fox Film Corp. v. *Muller*, 296 U. S. 207;
City of New York v. *Central Savings Bank*, 306 U. S. 661.

Appellant says that the affirmance by the Appellate Division was on the theory that the property in question had become a Federal reservation and appellee concedes that there is some basis for the conclusion from their language that "the common law and statutes in effect before the act of cession remain in force until displaced by Congress (*Kaufman* v. *Hopper*, 220 N. Y. 184, 187, 115 N. E. 470, and cases cited therein). There has been no action by Congress displacing the Labor Law in respect of this Federal reservation. Such Federal action as has taken place

is confirmatory of plaintiff's right to invoke the applicable State statutes. (45 Stat. 54, Title 16, U. S. Code, Section 457.)" (Dec. Ap. Div. R. 131.)

But neither the certification by the Court of Appeals nor the decision of an intermediate appellate court is competent to originate a Federal question which does not appear in the record.

> *Purcell* v. *New York Central R. R.*, 296 U. S. 545;
> *Alexander* v. *Morietonews*, 301 U. S. 702;
> *Honeyman* v. *Hanan*, 300 U. S. 14.

However, assuming for this discussion, as appellant contends, that exclusive jurisdiction had vested in the United States, would there then be a Federal question of substance involved?

POINT II.

Even if it be assumed that jurisdiction was effectively transferred to the United States prior to the date of the accident, the Labor Law nevertheless continued in force since it was not repugnant to Article I, Section 8, of the Federal Constitution, and therefore, no Federal question of substance is involved.

This point is addressed to appellant's argument labeled "C", page 12 of its brief, and it becomes necessary to consider same only if appellee's motion to dismiss is denied.

Appellant concedes that laws which regulate the personal and property rights of the individual, termed "municipal" continue in effect after change of sovereigns.

In *Chicago, Rock Is. & Pac. R.* v. *McGlinn*, 114 U. S. 542, page 546, Mr. Justice Field stated this rule as follows:

> "It is a general rule of public law recognized and acted upon by the United States that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal law of the country, i.e., the laws which were enacted for the protection of private rights, continue in force until abrogated by the new sovereign."

The New York Labor Law enacted for the benefit of workingmen is clearly within this rule.

Steele v. *Halligan*, 229 Fed. 1011 (Wash.).

The New York State Labor Law was before the late Mr. Justice Cardozo when he said in *Kaufman* v. *Hopper*, 220 N. Y. 184, 187, in an analogous case:

"The common law and statutes passed before the act of cession remain in force in the ceded territory until displaced by Congress, (McCarthy v. Packard Co., 105 App. Div. 436, aff'd, on opinion below, 182 N. Y. 555; Barrett v. Palmer, 135 N. Y. 336) but later statutes are of no effect. This is now the settled rule (Farley v. Scherno, 208 N. Y. 269; Ft. Leavenworth Ry. Co. v. Lowe, 114 U. S. 525, 537; W. U. Tel. Co. v. Chiles, 214 U. S. 274)".

In the *Kaufman* case, it appears that the Labor Law was enacted after jurisdiction had been effectively ceded by the State to the United States. It was for that reason that the law was held inapplicable. Had the Act of February 1, 1928 (45 Stat. 54) been in force at the time, the Labor Law would have been held applicable by "adoption".

Barrett v. *Palmer* was affirmed by this Court in *Palmer* v. *Barrett*, 162 U. S. 399. The following cases have reaffirmed this rule.

Murray v. *Joe Gerrick & Co.*, 291 U. S. 315;
Arlington v. *Fant*, 278 U. S. 439;
Vilas v. *Manila*, 220 U. S. 345;
Ft. Leavenworth Ry. Co. v. *Lowe*, 114 U. S. 525;
United States v. *Unzuetta*, 281 U. S. 138.

On page 14 of its brief, and quoting from Halleck's International Law (Volume 2, Chapter 34, Section 14, page 516) appellant says "that this rule that laws continue in force applies only to those adopted by the new sovereign as its own." That such contention is without merit can be seen from the language of the very decisions upon which appellant relies.

The rule is that State laws remain in force until abrogated or displaced by the new government. "Congress may,

however, adopt such later state legislation as respects territory under its jurisdiction * * *".

Murray v. *Joe Gerrick & Co.*, 291 U. S. 315, 317, 1935 (38 Op. Atty. Gen. 341).

Since the only point saved by appellant on the record is that the State law while valid was invalidly applied (R. 99 & 112), we limit ourselves to that question.

Unless then, it affirmatively appears that the State Labor Law was inconsistent with the purposes of the acquisition or was repugnant to Article I, Clause 17, Section 8 of the Federal Constitution, there is no question of substance involved.

Both parties rely upon the same authorities. The only reason assigned by appellant for the possible repugnance of the Labor Law is in the assertion that the duty to enforce the law in the Federal reservation would be an interference with Federal authority and that it cannot be reasonably inferred that the Federal Government intended that this statute should be only partially effective in its territory.

It is unnecessary to consider that question because we are concerned solely with the civil aspects of the law and the civil responsibility of one New York citizen to another New York citizen for an admitted violation of the State law by the former, resulting in the death of the latter, and the attempt to escape liability on the sole ground that, because the liability originated upon Federal territory, the State law was inapplicable.

Whether or not the State officers could have entered upon the "reservation" to prevent the wrong by compelling compliance with the Labor Law, is immaterial. The wrong was committed, the decedent met his death as a result thereof and the action at law for wrongful death under the State

Decedent Estates Law, Section 130,* gave to appellee the right to invoke the applicable provisions of the State Labor Law to sustain her right to recover, for the civil wrong.

Appellant may have been willing to gamble upon the assumption that the State could not enter upon Federal property to enforce the provisions of the Labor Law but that in no way detracted from its legal responsibility to those injured because of its failure to comply therewith.

Any other reasoning requires the conclusion that a Federal "enclave" creates a sanctuary for an independent contractor and no matter how deliberate or willful his negligence, he would nevertheless be immune from both the criminal and civil laws of the State.

Fortunately, such is not the law. As to its civil aspects, the Labor Law continued in force since in no way was it repugnant to the Federal Constitution or the purpose of the acquisition.

Chicago, Rock Island & Pa. R. v. *McGlinn*, 114 U. S. 542;
United States v. *Unzuetta*, 281 U. S. 138;
Ryan v. *State*, 302 U. S. 186;
Murray v. *Joe Gerrick & Co.*, 291 U. S. 315;
James v. *Draro*, 302 U. S. 134;
Silas Mason Co. v. *Tax Comm. of Wash.*, 302 U. S. 186;
Vilas v. *Manila*, 220 U. S. 345;
Williams v. *Arlington Hotel*, 22 F. (2nd) 669;
Palmer v. *Barrett*, 162 U. S. 399;
Arlington v. *Fant*, 278 U. S. 439;
Ft. Leavenworth Ry. Co. v. *Lowe*, 114 U. S. 525;
W. U. Tel. Co. v. *Chiles*, 214 U. S. 274.

These rules were restated by the Attorney General (1935, 38 Op. Atty. Gen. 341) when it was said that State laws

* Appendix, p. 37.

regulating private civil rights continued in force where they were consistent with exclusive jurisdiction and not inconsistent with the Federal laws or the purpose of the cession.

The Labor Law is concededly a valid enactment. There has been no Federal legislation to supersede it. No claim is made that its provisions are inconsistent with the purpose of the acquisition.

It follows that even if it be assumed that jurisdiction had been effectively transferred to the United States prior to the date of the accident the Labor Law was nevertheless applicable and no substantial Federal question is involved.

"Such Federal action as has taken place is confirmatory of plaintiff's right to invoke the applicable State statutes (45 Stat. 54, Title 16, U. S. Code, Section 457)". (Decision of the Appellate Division, R. 131.)

The Act of February 1, 1928, to which the learned Court referred, was before this tribunal in *Murray* v. *Joe Gerrick & Co.* (1934), 291 U. S. 315, and there can be no doubt but that the Appellate Division correctly interpreted Section 457, as indicated by this Honorable Court.

The sponsor of this Federal Act was the late Senator Walsh of Montana (Congressional Record, Volume 69, Part 2, page 678) who, in answer to the query of the Senator from Arkansas as to the purpose of the Act (id. 1293) stated it was "intended practically to make the application of what is known as Lord Campbell's Act to places within the exclusive jurisdiction of the United States" so that "if under the law of Arkansas a right of recovery could be had if the death occurred outside of the national park, the same right of action would exist if it occurred in the national park" (id., page 1486).

In *Ralph Sollett & Sons* v. *Comm. of Va.*, 292 U. S. 599, appellant therein, as in the instant case, asserted that a State

statute was improperly applied to property under the exclusive jurisdiction of the United States by virtue of Article I. Section 8, Clause 17. The appeal was dismissed for want of a substantial Federal question and rehearing was denied, April 30th, 1934.

Although the point was not made in the trial Court and is not within the certification of the Court of Appeals, appellant contends, (argument "D") that to enforce the Labor Law would operate to control and restrict the conduct of a Federal project and that therefore it was repugnant in that respect.

Even if that question were properly before the Court, it is an objection that the United States or its agents might make but hardly the appellant, who, as an independent contractor is neither arm, agent or instrumentality of the Federal Government.

In *Baltimore Ship Building & Drydock Co.* v. *Baltimore*, 195 U. S. 375, a contractor engaged in the construction of a Federal project asserted a similar claim as an alleged instrumentality of the Government and that any interference by the State was a violation of its immunity. Such contention was rejected by this Court.

Ralph Sollett & Sons v. *Comm. of Va.* (*supra*) is to the same effect.

In *General Construction Co.* v. *Fischer*, 39 Pa. (2nd) 358, an appeal was also dismissed by this Court for want of a substantial Federal question, 295 U. S. 715. The lower Court had rejected appellant's contention of immunity in the following language:

> "When plaintiff, an independent contractor for gain, entered into a contract to perform labor and furnish materials to the Federal Government, it did not thereby become a part of, or an instrumentality of the United States Government."

In accord are:

Trinity Farms Construction Co. v. Grosjean, 291 U. S. 466;
James v. *Draco*, 302 U. S. 134.

The principle of immunity is generally based upon the direct ownership or use and control of the property by the United States. Such immunity does not extend to a general contractor merely because he has a contract with the United States. As was said in *Fidelity & Deposit Co.* v. *Pa.*, 240 U. S. 319, 60 L. Ed. 664, 36 S. Ct. 298,

> "Mere contracts between private corporations and the United States do not necessarily render the former Government agents or confer freedom from State control."

Thompson v. *Union Pacific Ry.*, 9 Wall. 579;
Metcalf & Eddy v. *Mitchel*, 269 U. S. 514;
Gromer v. *Standard Dredging*, 224 U. S. 362.

In *James* v. *Draco*, it was pointed out that an independent contractor engaged in constructing a Federal project upon Federal property remained nevertheless an independent contractor and did not thereby become an instrumentality of the Government.

Alward v. *Johnson*, 282 U. S. 509.

The reference to the act sponsored by Senator Shepard (appellant's brief, page 18) as evidence of a presumption not to adopt State safety laws on Federal projects is to our minds frivolous. In the first place, the language of the proposed act clearly indicates that its purpose was to adopt the enforcement features of the State safety laws. It is also just as reasonable to say, as long as appellant is presumptu-

ous, that the act failed of enactment because application of the State safety laws could be spelled out from The Act of February 1, 1928 (45 Stat. 54, Title 16, U. S. Code 457).

When it was decided in *Murray* v. *Joe Gerrick & Co.*, 291 U. S. 315, that the compensation act of Washington was not within the purview of the Act of February 1, 1928, since it contemplated "actions at law" and not "a system by which employers contribute to a fund to which injured workmen must look for compensation", Congress voiced its reaction by passing the Act of June 25, 1936 (49 Stat. 938) which not only made State Compensation Laws applicable to Federal projects but gave to the State agencies the power of enforcement.

This act is indicative of the intention of Congress not only to continue the force and effect of the State laws regulating private civil rights, but also to adopt later laws which provide for the welfare and safety of workmen. That a law may be effective to control private civil rights and nevertheless incapable of enforcement is borne out by this act for unless specific enforcement powers were given to State agencies, such enforcement or police power would have remained with the Federal Government.

The *Murray* case held that the compensation act of Washington "was not a right of action" within the Act of February 1, 1928.

New York Labor Law, Section 241, Subdivision 4, creates that "right of action" and we quote from appellant's brief, page 4, in opposition to our motion to dismiss:

> "* * * it has been uniformly held that violation of a statute, which imposes a positive duty for the benefit of a particular class, creates a cause of action in favor of any member of that class who is injured through its violation, regardless of 'negligence'. The duty is created by the statute, regardless of the existence of

> any duty at common law (cases cited). The Labor Law is such a statute. It imposes absolute, non-delegable duties upon those in control of the construction of buildings, for the protection of all persons engaged in the work. Civil liability for injuries or death, resulting from the breach thereof, follows by operation of law" (cases cited).

The New York Decedent Estate Law, Section 130, which gave to appellee a right to hold appellant liable for its admitted negligence, is clearly within the purview of the act of February 1, 1928.

The Labor Law defines the duties owed by a contractor to employees and provides that violation thereof gives rise to a civil action for any injury or death attributable to its violation. Such a law is "municipal" as distinguished from political.

We have pointed out that in *Kaufman* v. *Hopper*, 220 N. Y. 184, the provisions of the New York State Labor Law were before the late Mr. Justice Cardozo. His opinion was based in part upon the decision of Mr. Justice Field in *Chicago, Rock Is. & Pa. R.* v. *McGlinn*, 114 U. S. 542, wherein "municipal laws" were termed as "the laws which are intended for the protection of private rights."

As we stated earlier herein, had the Act of February 1, 1928, *ante*, been in force, it is logical to say that the Labor Law would have been decreed "adopted" as a "municipal law."

In *Bradford Elect. Lt. Co.* v. *Clapper*, 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, at pages 157, 158, this Court said:

> "Workmen's Compensation Acts are treated, almost universally, as creating a statutory relation between the parties * * * not, like employers liability acts as substituting a statutory tort for a common law tort."

The Labor Law, likewise substituted a statutory tort for a common law tort but it nevertheless remained as the law intended for the protection of private rights, "the municipal law."

Appellant's strained distinction to avoid a just liability is without substance.

We submit, therefore, that the State statute was in force no matter whether it be decided that the State or the United States had jurisdiction of the enclave at the time and therefore no Federal question of substance is involved.

POINT III.

No Federal question of substance is presented by the contention (assignment #6, R. 143) that the State Court erred in excluding defendant's exhibit "A" for identification.

Without preliminary foundation, the appellant offered into evidence two sections of the specifications of the alleged contract between the Treasury Department and itself.

This was the only evidence offered by it (R. 110) and counsel stated, "And I want to call attention particularly to the things I have in mind, two sections of the specifications which by reference are made part of the contract."

At page 111, folio 332, "It is my claim * * * the United States Government through proper authority has specifically limited and exempted from application and declared a policy that those provisions are not applicable."

Under the guise of "argument D", appellant for the first time asserts that its contract was an instrumentality of the Federal Government and, as applied herein, the Labor Law conflicted and interfered with that contract and its performance.

We contend that no such question is properly before the Court and even if it were it is without merit.

Patterson v. *State of Alabama*, 294 U. S. 600.

In this point we address ourselves to appellant's arguments labeled "D" and "E"; except as already referred to *ante*.

The reason for the exclusion of the proffered evidence by the Court is not stated but appellant concedes the rule of law to be "that a contract may not relieve a party thereto from the performance of a duty to a stranger to it". (Appellant's Brief, p. 20.)

It asserts, however, that the contract was an instrumentality of the United States and also evidence of executive determination that compliance with the statute would burden, hinder and interfere with the performance thereof.

In answer, we contend, that even if this question were properly before the Court, no such intention is apparent from the language of the proffered sections and further that the Treasury Department was without power to grant to appellant immunity from the otherwise applicable provisions of the laws of the State, since that power, legislative in its nature, is expressly reserved to Congress.

The sections excluded, are as follows:

Section 21, Protection of Public and Property (R. 121):

> "The contractor shall * * * comply with all Municipal ordinances which apply to the use of sidewalks and streets or alleys for building operations, but such ordinances do not apply inside of the lot lines. He shall be held responsible for any damage or injury to persons or property which may occur as a result of his fault or negligence in the prosecution of the work."

Section 22. Permits:

> "The contractor shall without additional expense to the Government obtain all required licenses, permits, etc. This applies to work outside the lot lines, the use of streets and sidewalks, the protection of public and traffic, connections to utility service lines, etc. State or Municipal Building Regulations do not apply to work inside the Government's lot lines."

We find nothing contained therein which says in words or substance that appellant was not required to comply with the provisions of the State Labor Law. Section 21, as its title indicates, relates to "protection of public and property" and requires the contractor to provide and maintain all necessary guard rails, etc., for the protection of the public and to comply with sidewalk ordinances in so far as they apply inside of the lot lines. It provides, however, that the contractor "shall be held responsible for any damage or injury to persons or property which may occur as a result of its fault or negligence in the prosecution of the work."

We doubt that it can be said with reason that it was the intention of the Treasury Department by this language to relieve appellant from the necessity of complying with the Labor Law provisions and thereby be free from any responsibility attributable to such noncompliance.

Section 22, as its title indicates, required the contractor to procure permits for work outside the lot lines but not inside. In an advisory manner it says "state or municipal building regulations do not apply to work inside the government lot lines." In our opinion the last sentence refers solely to permit requirements. Appellant claims, however, that this granted complete immunity to it and it was therefore at liberty to disregard any and all State laws provid-

ing for the safety and protection of hundreds of men employed.

Under the Penal Law of New York State, Section 1275, violation of the Labor Law or any rule, regulation or order adopted or made in pursuance of its provisions is a misdemeanor. Enforcement is entrusted to State officers outside of cities but otherwise to local city agencies.

It is true that when a new sovereign becomes the owner of property with exclusive jurisdiction thereof, enforcement or police power immediately passes to it. Substantive rights in existence, however, can only be altered by direct action by that sovereign (Point II).

That there is a definite distinction between substantive and/or civil rights as distinguished from their penal character, appears from U. S. Code, Title 10, Section 290,* enacted June 25, 1936, Chapter 822, Section 1 and 2 (49 Stat. 1938). By this act not only are State compensation laws made applicable to Federal projects, but in addition, the power of enforcement is given to the "agencies of the State". This act was passed about a year after the decision in *Murray v. Joe Gerrick & Co.*, 291 U. S. 315, and removed any question about the applicability of State compensation laws to Federal projects. It also removed the necessity of deciding whether or not State compensation laws were within the purview of the Act of February 1, 1928, Chapter 15 (Title 16, U. S. Code, Section 457).

It is therefore apparent that Congress recognized that while State laws might continue in force even after the United States accepted jurisdiction, still, unless the agencies of the State were given the power to enforce them, that right remained with the United States. Until similar action is taken with respect to other State laws, to wit: The Labor

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* (Appendix, p. 38.)

Law, its civil aspect governing the private rights of citizens continues in force in Federal enclaves but the enforcement thereof remains in the hands of the Federal Government.

We doubt that appellant would contend that the Treasury Department by contract could remove the application of State compensation laws in view of U. S. Code, Title 40, Section 290.* For the same reason the Treasury Department could not and in fact did not attempt to remove the effectiveness of the Act of February 1, 1928.

Even if it be assumed that the Treasury Department intended to do so, it was without power to accomplish that result. Under the United States Constitution, Article I, Section 8, Clauses 17, 18, only Congress is vested with power to enact laws or to repeal them. The powers conferred upon executive heads of executive departments are administrative, not legislative.

United States v. *George*, 228 U. S. 415.

Regulations by an executive must be consistent with law. They may not be extended so as to alter, amend and defeat a law already enacted by Congress. Where rights, duties and obligations are defined by statute they cannot be taken away or abrogated by the act of an executive department.

Campbell v. *United States*, 107 U. S. 407;
Morrell v. *Jones*, 166 U. S. 466.

The legislative power vested in Congress cannot be abrogated or assigned.

Panama Refining Co. v. *Ryan*, 293 U. S. 388; 55 S. Ct. 241;
Curran v. *Wallace*, 306 U. S. 1; 59 S. Ct. 379.

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* (Appendix, p. 38.)

The Treasury Department was without authority to grant immunity to appellant even if it intended to do so.

Panama Refining Co. v. *Ryan* (*supra*).

And this is particularly true when the contract or regulations are in conflict with the express statutory provisions.

Maryland Cas. Co. v. *U. S.*, 251 U. S. 342.

We have been unable to find any Congressional enactment which expressly or impliedly gives to the Treasury Department the authority to remove the effect of applicable State laws or United States laws.

To the contrary we find the Act of February 1, 1928 (Title 16, U. S. Code, Section 457) confirming appellee's right to recover and the later Act of June 25, 1936 (49 Stat. 1938), both evincing an intention upon the part of the Federal Government to permit the States to apply State laws dealing with purely local matters even though the enclave happens to be under the "exclusive jurisdiction" of the United States.

Although appellant advances that argument, it seems incredible that the Treasury Department would attempt by contract to remove application of the State Labor Law which gives rise to an "action at law" at the effective date of the cession which was clearly within the contemplation of the Act of February 1, 1928.

It has always been the practice of the Federal Government to provide for the safety of workmen engaged in the construction of Federal buildings even though general contractors are acting independently.

While the contract between appellant and the Treasury Department is not in evidence, the inference is that it required appellant to provide compensation insurance for the

protection of its own employees and liability insurance for the protection of the employees of others because those very conditions were exacted by appellant of the United Hoisting Co., Inc. in its subcontract which is in evidence (R. 118, plaintiff's Exhibit "3", R. 119, 120).

Merely asserting that the State Labor Law did not apply is legally insufficient unless it is shown that some contrary Federal rule was controlling.

It is difficult to believe that appellant seriously contends that it was free from any and all responsibility to the employees of subcontractors regardless of the extent of its negligence in providing for their safety.

Yet, as strange as it seems, that is exactly the position it takes. It says, we admit that we failed to protect the "bay" where Sadrakula was working and it is true that we have been found negligent in that respect and responsible for his death, but nevertheless, the State Labor Law was inapplicable. In other words, its position is that the "reservation" was without any laws.

To prevent such a situation the rule in *Chicago, Rock Is. & Pa. Ry* v *McGlinn*, 114 U. S. 542, 546, was laid down. Therein it was decided that in order to escape the impossible conclusion that no law existed to determine the rights and duties of the inhabitants of those areas, the Courts borrowed the international rule (*Vilas* v. *Manila*, 220 U. S. 345) that upon a cession of jurisdiction the laws of the old sovereignity remain in force until abrogated by the new, unless "in conflict with the political character, institutions, and constitution of the new government."

We are thus brought back to our contention in Point II that no matter how appellant may view it in a different light, the only law which could properly have been held applicable was the New York State Labor Law and since that was the State Law in force at the time, no action of the Treasury

Department even if so intended could have removed its effectiveness.

The case of *Anderson* v. *Chicago & N. W. R. R. Co.* (162 Neb. 578, 168 N. W. 196), cited by appellant (brief, p. 12), supports our contention.

In the *Anderson* case, land was ceded to the United States for the purpose of a Military reservation. The railroad company had a right of way running directly through the center and at the time of cession, there was a State Law in existence requiring such right of way to be fenced in. The railroad company attempted to comply with the State law but was prevented from so doing by the Commanding Officer because the fence would divide the "reservation" into two equal parts and greatly restrict the use of the property for the purpose of the acquisition.

It was very properly decided that as the State law was inconsistent with the very purpose of the acquisition, it ceased to exist in the reservation. It was not the action of the Secretary of War that removed the effect of the State Law, but rather the general rule of law (*Chicago Rock Is. & Pa. R.* v. *McGlinn*, *supra*) that the laws continue upon the reservation "where not inconsistent with the purpose of the cession."

We believe that in our Point "II" we have sufficiently refuted appellant's argument "D".

We would nevertheless like to submit what was said by this Court in *Trinity Farms Construction Co.* v. *Grosjean*, 291 U. S. 466, 78 L. Ed. 919.

> "Appellant is an independent contractor. Casement v. Brown, 148 U. S. 615, 622, 13 S. Ct. 672, 37 L. Ed. 582, 585. It is not a government instrumentality. Cf. Metcalf v. Mitchell, 269 U. S. 514, 70 L. Ed. 384, 46 S. Ct. 172;

Group No. 1 Oil Corp. v. Bass, 283 U. S. 279, 75 L. Ed. 1032; 41 S. Ct. 432."

"If the payment of State taxes imposed on the property and operations of appellant affects the Federal Government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct (cases cited). Appellant's claim of immunity is without foundation."

In the same manner, appellant's contention that if the State sought to enforce the Labor Law in the "enclave", it then would be an interference with a Federal instrumentality, is also without foundation.

CONCLUSION.

It is respectfully submitted that appellee's motion to dismiss or affirm should be granted because:

(a) This Court is without jurisdiction to hear the appeal (Point I)

(b) The decision of the State Court rests upon independent non-Federal ground adequate to support it

(c) No Federal question of substance is involved.

Respectfully submitted,

LEO FIXLER

APPENDIX.

§290. State workmen's compensation laws; extension to buildings and works of United States

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

For the purposes set out in this section, the United States of America hereby vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: Provided, however, That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: Provided further, That nothing

in this section shall be construed to modify or amend sections 751 to 796 of Title 5. (June 25, 1936, c. 822, §§1, 2, 49 Stat. 1938, 1939.)

New York "Death" Act (Decedent Estate Law, Sec. 130; Consolidated Laws of New York, Chap. 13, Sec. 130).

"Sec. 130. Action by executor or administrator for negligence or wrongful act or default causing death of decedent.

The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. * * *." (Remainder thereof not pertinent.)

Act of Feb. 1, 1928, 45 Stat. 54 (Tit. 16, U. S. C. A., Sect. 457).

Section 457. ACTION FOR DEATH OR PERSONAL INJURY WITHIN NATIONAL PARK OR OTHER PLACE UNDER JURISDICTION OF UNITED STATES; APPLICATION OF STATE LAWS. In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be. (Feb. 1, 1928, c. 15, 45 Stat. 54.)

P. 2.

SUPREME COURT OF THE UNITED STATES.

No. 251.—October Term, 1939.

James Stewart & Co., Inc., Appellant,
vs.
Katherine Sadrakula, as Administratrix, etc. of Nicholas Sadrakula, deceased.

Appeal from the Supreme Court of the State of New York.

[January 29, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

This is an appeal from a final judgment of the Supreme Court of New York awarding damages for accidental death. As a statute of the state necessarily was sustained against a contention that its application to these circumstances violated the provisions of the Constitution as to the exclusive authority of the United States over a post-office site purchased with the consent of New York,[1] this Court has jurisdiction under Section 237(a) of the Judicial Code and the Act of January 31, 1928.

The issue of law involved is whether an existing provision of a state statute requiring the protection of places of work in the manner specified in the statute[2] remains effective as a statute of the United States applicable to the particular parcel after the federal government acquires exclusive jurisdiction of a parcel of realty on which work is being done.

The decedent, an employee of a rigging company, a sub-contractor engaged in the construction of the New York post office, fell from an unplanked tier of steel beams down a bay and was killed. In an action of tort against the general contractor, his administra-

[1] Constitution, Art. I, Sec. 8, Cl. 17:

"The Congress shall have Power . . . To exercise exclusive Legislation . . . over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . ."

[2] New York Labor Law § 241 reads as follows:

"Sec. 241. Protection of Employees on Building Construction or Demolition Work. All contractors and owners, when constructing or demolishing buildings, shall comply with the following requirements:

trix narrowed the scope of the charges of negligence until violation of the quoted sub-section of the Labor Law only was alleged. The trial court found that the proximate cause of the accident was the negligent failure to plank the beams as required by the statute. The Appellate Division affirmed[3] on the ground that the Labor Law provision continued effective over the post-office site after the transfer of sovereignty, and the Court of Appeals by an unreported order of remittitur also affirmed on the same ground with a statement that in its affirmance it necessarily passed upon the validity and applicability of Section 241(4) of the Labor Law under Article I, Section 8 of the Constitution.

The language of the Court of Appeals and the record show indubitably that a determinative federal question was decided.[4] The conclusion as to the continued vitality of existing state statutory regulations in the protection of workmen in ceded federal areas makes it substantial.[5] The motions to dismiss or affirm the appeal are denied.[6]

If the quoted provision of the Labor Law is operative even though exclusive jurisdiction had already vested in the United States, it is unnecessary to determine whether exclusive jurisdiction had actually passed to the United States. The state courts assumed that federal sovereignty was complete through consent by the state and we make the same assumption. Does the acceptance of sovereignty by the United States have the effect of displacing this sub-section of the New York Labor Law? We think it did not. The sub-section continues as a part of the laws of the federal territory.

It is now settled that the jurisdiction acquired from a state by the United States whether by consent to the purchase or by cession

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"4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces reasonably required for proper construction of the iron or steel work, for hoisting or lowering of material or for stairways and elevator shafts designated by the plans and specifications."

[3] 254 App. Div. 892.

[4] Honeyman v. Hanan, 300 U. S. 14, 19; Whitfield v. Ohio, 297 U. S. 431, 435; cf. McGoldrick v. Gulf Oil Corp., No. 473, October Term, 1939, decided January 15, 1940.

[5] Milheim v. Moffat Tunnel Dist., 262 U. S. 710, 716.

[6] Cf. Mason Co. v. Tax Commission, 302 U. S. 186, 197; Murray v. Gerrick & Co., 291 U. S. 315-16.

may be qualified in accordance with agreements reached by the respective governments.[7] The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred.[8] This assures that no area however small will be left without a developed legal system for private rights. In *Chicago, Rock Island and Pacific Railroad* v. *McGlinn, supra,* a Kansas statute relating to recovery against a railroad for the injury to livestock on its right of way existed at the time of the cession to the United States of exclusive jurisdiction over Fort Leavenworth Military Reservation. It was held that the statute was carried over into the law covering the Reservation. Conversely, in *Arlington Hotel Company* v. *Fant, supra,* an Arkansas statute relieving innkeepers, passed after cession of Hot Springs Reservation, was held unavailing as a defense to a Reservation innkeeper's common-law liability in accordance with Arkansas law before the cession. Such holdings assimilate the laws of the federal territory, where the Congress has not legislated otherwise, to the laws of the surrounding state.

The Congress has recognized in certain instances the desirability of such similarity between the municipal laws of the state and those of the federal parcel. Since only the law in effect at the time of the transfer of jurisdiction continues in force, future statutes of the state are not a part of the body of laws in the ceded area. Congressional action is necessary to keep it current. Consequently as defects become apparent legislation is enacted covering certain phases. This occurred as to rights of action for accidental death by negligence or wrongful act.[9] After this statute was held inapplicable to claims under state workmen's compensation acts further legislation undertook to extend the provisions of those acts to the places under federal sovereignty.[10] With growing

[7] Collins v. Yosemite Park Co., 304 U. S. 518, 529-30; James v. Dravo Contracting Co., 302 U. S. 134, 147-49.

[8] Murray v. Gerrick & Co., 291 U. S. 315, 318; Arlington Hotel Co. v. Fant, 278 U. S. 439, 445, 446, 454; Chicago, R. I. & Pac. R. R. v. McGlinn, 114 U. S. 542, 546-47.

[9] 45 Stat. 54, 16 U. S. C. § 457 (1928); see Murray v. Gerrick & Co., 291 U. S. 315, 319; H. R. Rep. No. 369, 70th Cong., 1st Sess.; 69 Cong. Rec. 1486.

[10] 49 Stat. 1938, 40 U. S. C. § 290 (1936); see H. R. Rep. No. 2656, 74th Cong., 2d Sess.

frequency the federal government leaves largely unimpaired the civil and criminal authority of the state over national reservations or properties.[11] While exclusive federal jurisdiction attaches, state courts are without power to punish for crimes committed on federal property.[12] This has made necessary the legislation which gives federal courts jurisdiction over these crimes.[13] The tendency toward a uniformity between the federal and surrounding state territory has caused a series of congressional acts adopting the state criminal laws.[14] Through these concessions our dual system of government works cooperatively towards harmonious adjustment.

It is urged that the provisions of the Labor Law contain numerous administrative and other provisions which cannot be relevant to the federal territory. The Labor Law does have a number of articles.[15] Obviously much of their language is directed at situations that cannot arise in the territory. With the domestication in the excised area of the entire applicable body of state municipal law much of the state law must necessarily be inappropriate. Some sections authorize quasi-judicial proceedings or administrative action and may well have no validity in the federal area. It is not a question here of the exercise of state administrative authority in federal territory.[16] We do not agree, however, that because the Labor Law

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[11] 30 Stat. 668 (1898) (jurisdiction receded to states over places purchased for branches of soldiers' homes); 49 Stat. 668, 16 U. S. C. § 465 (1935) (waiver of federal jurisdiction for historic sites); 49 Stat. 2025, 40 U. S. C. § 421 (1936) (same for slum-clearance and low-cost housing projects); 49 Stat. 2035 (1936) (same for resettlement and rural rehabilitation); 50 Stat. 888, § 13(b), 42 U. S. C. § 1413(b) (1937) (same for acquisitions of U. S. Housing Authority).

[12] Bowen v. Johnston, 306 U. S. 19, 29; United States v. Unzeuta, 281 U. S. 138; United States v. Cornell, Fed. Cas. No. 14,867; Commonwealth v. Clary, 8 Mass. 72; People v. Hillman, 246 N. Y. 467.

[13] Judicial Code §§ 24, 27.

[14] R. S. 5391; 30 Stat. 717 (1898); 35 Stat. 1145 (1909); 48 Stat. 152 (1933); 49 Stat. 394 (1935).

[15] Article (1) Short title; definitions; (2) The department of labor; (3) Review by industrial board and court; (4) Employment of children and females; (5) Hours of labor; (6) Payment of wages; (7) General provisions; (8) Public work; (8-a) Grade crossing elimination work; hours and wages; (9) Immigrant lodging houses; (10) Building construction, demolition and repair work; (11) Factories; (12) Bakeries and manufacture of food products; (13) Manufacture in tenement houses; (14) Mercantile and other establishments; (15) Mines and tunnels; quarries; compressed air; (16) Explosives; (17) Public safety; (18) Miscellaneous provisions; laws repealed; when to take effect.

[16] We do not therefore need to consider the authority of the state administrative officers. New York Labor Law § 242. Cf. Oklahoma City v. Sanders, 94 F. (2d) 323 (C. C. A. 10). In this case an injunction was obtained in the

is not applicable as a whole, it follows that none of its sections are. We have held in *Collins* v. *Yosemite Park Company*[17] that the sections of a California statute which levied excises on sales of liquor in Yosemite National Park were enforceable in the Park, while sections of the same statute providing regulation of the Park liquor traffic through licenses were unenforceable.[18]

But the authority of state laws or their administration may not interfere with the carrying out of a national purpose.[19] Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way.[20]

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federal district court enjoining a city and certain of its officers from enforcing ordinances relating to licenses, bonds and inspections by daily arrests on account of violations of these ordinances by a contractor doing construction work on a low-cost housing project. The decree was affirmed by the circuit court of appeals after consideration of the Act of June 29, 1936 which reads that "The acquisition by the United States of any real property . . . in connection with any low-cost housing . . . project . . . shall not be held to deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property . . . ." Except as affected by the act just quoted in part, the area was federal territory through a consent statute. The Court, speaking of the recession, said:

"It was not the purpose that the state should have the right to exert police power there through application of municipal ordinances relating to licenses, bonds, and inspections in the course of construction thereon of buildings by the United States government, no such legislative intent or desire being indicated by the act."

It also quoted with approval an excerpt from an opinion of the Director, Legal Division, Federal Emergency Administration of Public Works:

"I am, therefore, of the opinion that the state or local government may not supervise the work of a contractor performing work on property owned by the United States of a contract with the United States."

[17] 304 U. S. 518, 532.

[18] We do not overlook the language in Murray v. Gerrick & Co., 291 U. S. 315, 319, called to our attention by appellant:

"If it were held that beneficiaries may sue, pursuant to the compensation law, we should have the incongruous situation that this law is in part effective and in part ineffective within the area under the jurisdiction of the federal government."

That quotation had reference to a contention that the dependents of an employee, killed on federal territory within a state, might claim compensation as beneficiaries under a state compensation act. The compensation fund, collected and administered by state officers, was not effective in federal territory. Cf. Atkinson v. Tax Commission, 303 U. S. 20, 25. As the fund was not augmented by assessments against the federal contractor, the Court held the procedural provisions of the state compensation act did not apply.

[19] Pittman v. Home Owners' Corp., 308 U. S. 21; Atkinson v. Tax Commission, 303 U. S. 20, 23; James v. Dravo Contracting Co., 302 U. S. 134, 147, 161; United States v. Unzeuta, 281 U. S. 138, 142; Ohio v. Thomas, 173 U. S. 276, 283; Fort Leavenworth v. Lowe, 114 U. S. 525, 531; Kohl v. United States, 91 U. S. 367, 371-72; Thomson v. Pacific R. R., 9 Wall. 579, 591.

[20] Anderson v. Chicago & N. W. Ry., 102 Neb. 578, as commented upon in United States v. Unzeuta, 281 U. S. 138, 144.

May it be said that the continued application of Section 241(4) of the Labor Law[21] will interfere with the construction of the building upon this site? This is like other squares in the city. There are, of course, differentiations because of its ownership, but ownership as such has nothing to do with the safety requirements. It is true that it is possible that the safety requirement of boarding over the steel tiers may slightly increase the cost of construction to the government, but such an increase is not significant in the determination of the applicability of the New York statute. In answer to the argument that a similar increased cost from taxation would "make it difficult or impossible" for the government to obtain the service it needs, we said in *James* v. *Dravo Contracting Company*[22] that such a contention "ignores the power of Congress to protect the performance of the functions of the National Government and to prevent interference therewith through any attempted state action." Such a safety requirement is akin to the safety provisions of Maryland law which in *Baltimore & Annapolis Railroad* v. *Lichtenberg*[23] were held applicable to trucks of an independent contractor transporting government employees under a contract with the United States.

Finally the point is made that a provision requiring boarding over of open steel tiers is a direct interference with the government. This is said to follow from the fact that the contract for the construction of the post office is an instrumentality of the federal government. As a corollary to this argument, error is assigned to the refusal of the trial court to admit in evidence a clause of the contract between the United States and the appellant reading, "State or Municipal Building Regulations do not apply to work inside the Government's lot lines."[24] While, of course, in a sense the contract is the means by which the United States secures the construction of its post office, certainly the contractor in this independent operation

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[21] Note 2, *supra.*

[22] 302 U. S. 134, 160, 161.

[23] 4 A. (2d) 734 (Md.), appeal dismissed for want of a substantial federal question, *sub nom* United States v. Baltimore & Annapolis R. R., No. 78, October Term, 1939, decided December 18, 1939.

[24] The entire section reads:

"22. Permits. The contractor shall without additional expense to the Government obtain all required licenses, permits, etc. This applies to work outside the lot lines, the use of streets and sidewalks, the protection of public and traffic, connections to utility service lines, etc. State or Municipal Building Regulations do not apply to work inside the Government's lot lines."

does not share any governmental immunity.[25] Nor do we think there was error in refusing to admit the clause of the contract as to building regulations. The quoted sentence is in a section of the contract relating to "licenses, permits, etc." We are of the opinion that it is intended to relieve the contractor from provisions as to types of material, fire hazards and the like, which are covered by the New York City Building Code.

Such a safety regulation as Section 241(4) of the New York Labor Law provides is effective in the federal area, until such time as the Congress may otherwise provide.[26]

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[25] James *v.* Dravo Contracting Co., 302 U. S. 134, 152; Helvering *v.* Producers Corp., 303 U. S. 376, 385.

[26] 68 Opinions of the Attorney General 341, 348, 349, is not to the contrary. It declared that Section 2 of a Nevada consent statute was clearly incompatible with exclusive jurisdiction. The section read:

"In the erection of such federal building by contract or otherwise, or in case of any subsequent reconstruction or alteration of such building, it is hereby reserved and provided that the state labor laws, the state labor safety laws and the state health laws, shall apply to all persons, firms, associations or corporations having contracts for such construction or reconstruction as to all provisions contained therein, and no contractor having any such contract shall have the right to claim to be or to declare himself to be a government instrumentality."

The opinion however further stated:

"It is to be observed that there is nothing in what has been said concerning Sections 2 and 3 of the Nevada Statute inconsistent with the doctrine that state laws regulating private civil rights (as distinguished from state criminal laws . . .) continue in force, as laws of the United States, on lands ceded by consent of the state to the United States, if not in conflict with the laws of the new sovereignty or the purpose for which the land is acquired, until superseded by laws enacted by the United States. . . . The difficulty with Sections 2 and 3 of the Nevada Act is that they do not merely occupy a vacant field until filled by the Federal Government—they withhold and reserve jurisdiction, present and future, over the matters specified in them, howsoever inconsistent with existing or future laws of the United States. That precludes exclusive jurisdiction from vesting in the United States."